Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	CG Docket No. 02-278
Petition for Expedited Declaratory Ruling Regarding the Application of 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act	

Comments of Robert Braver in Opposition to Petition for Expedited Declaratory Ruling filed by Yodel Technologies LLC

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Summary

The Commission should deny the petition for a declaratory ruling and retroactive waiver filed by Yodel Technologies LLC ("Yodel").[1] Yodel has flagrantly violated the TCPA and this Commission's rules. It is not entitled to the relief it seeks.

Yodel runs telemarketing campaigns for a variety of industries, including home security, vacations resorts, and ridesharing services.[2] Yodel does not work from customer lists – it purchases bulk consumer data from third-party sellers who traffic the names, addresses, and telephone numbers of everyday Americans for cash, knowing that these people have not consented to received Yodel's calls. Yodel calls the phone numbers it has purchased with a predictive dialer and "spoofs" the caller ID information to hide its identity. When the dialer detects an answer, the dialer transfers the calls to a "soundboard agent" working in a call center in India who then tries to sell whatever product or service Yodel has been hired to shill. However, rather than actually speaking to the called parties, these soundboard agents play numerous prerecorded voice messages throughout the call because they either cannot speak English or have a heavy accent that would make conversation difficult.

The prerecorded voice messages loaded in to Yodel's soundboard system do not convey legitimate telemarketing messages. Yodel uses them to deceive and mislead the public. In a single campaign that Yodel conduct on behalf of Northstar Alarm Services LLC[3] in 2016 in

[1] *Petition for Expedited Declaratory Ruling Regarding the Application of 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act or In The Alternative Retroactive Waiver filed by Yodel Technologies, LLC*, CG Docket No. 02-278 (September 13, 2019), https://www.fcc.gov/ecfs/filing/1091320379447 (Petition).

[2] *See e.g, Exhibit 1 - Braver v. NorthStar Alarm Servs., LLC, 2019 U.S. Dist. LEXIS 118080, *7 (W.D. Okla. 2019); Person v. Lyft*, 19-cv-2914 (N.D. Ga.), Doc. 40 at ¶¶ 41-44; *Moore v. Club Exploria*, 19-cv-2504 (N.D. Ill.) Doc. 1 at ¶¶ 24-29.

[3] Northstar has filed its own petition for a declaratory ruling. See *Petition for Expedited Declaratory Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act*, CG Docket No. 02-278 (January 2, 2019), https://ecfsapi.fcc.gov/file/10103290733918/NorthStar%20FCC%20Petition.pdf

which Yodel placed 75 million telemarketing calls, Yodel used its prerecorded voice messages to: impersonate government agencies ("I am with the department of Home Security") (Exhibit 2 at p. 1); tell fabricated stories about local emergencies ("the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood") (*ibid.*); lie about the persons using the soundboard ("I grew up in Alabama, so I'm obviously an Alabama fan!") (*Id.* at p. 8); lie about where the calls are calling from ("I'm calling from Palm Harbor Florida;" "the weather here in Florida is beautiful almost year round") (*Id.* at pp. 7, 9); and lie about the very fact that they are using prerecorded messages ("Ha ha….You know, I've never had that question before. I do have to follow a strict script and, uh, I guess I sound kind of strange sometimes!") (*Id.* at p. 5).

Yodel asks the commission to declare that the prerecorded voice messages it uses are not regulated by the TCPA because they only play when a human being presses a button and thus are not "fully automated." Nothing in the TCPA or this commission's rules requires this result. A federal court has already rejected Yodel's arguments on this point and found that Yodel's soundboard calls violated the plain language of the TCPA. *See Exhibit 1 - Braver v. NorthStar Alarm Servs., LLC*, 2019 U.S. Dist. LEXIS 118080 (W.D. Okla. 2019) ("the Braver Litigation").

In the alternative, Yodel asks the commission for a retroactive waiver of liability under 47 U.S.C. § 227(b)(1)(B) of the TCPA. However, the commission does not have the authority to waive statutory provisions. Moreover, Yodel does not qualify for a retroactive waiver in any case. The commission should hold Yodel to account for its egregious conduct, not give it a pass.

I. Yodel is Burdening Americans with Millions of Deceptive Prerecorded Telemarketing Calls

The reality of Yodel's telemarketing operation was laid bare in the *Braver* litigation, where a federal court made findings of fact after reviewing extensive evidence, and it utterly refutes the self-serving descriptions that Yodel offers about its operation. Among the court's numerous findings, the court found as a matter of *fact* that:

1. Yodel purchased a bulk list of "landline telephone numbers, names, and addresses of homeowners across the country" from a data vendor *knowing* that these people had not consented to receive telemarketing calls. *Exhibit 3 - Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 326 (W.D. Okla. 2018).

2. Yodel then used an "automated predictive dialer" to call the telephone numbers it had purchased. "A computer dialed the telephone number, detected whether it was answered by a potential customer and, if so, transferred the connected call to a soundboard agent who was trained to play prerecorded wav files (audio files) to deliver messages to the called party by pressing buttons." *See Exhibit 1 - Braver v. NorthStar Alarm Servs., LLC*, 2019 U.S. Dist. LEXIS 118080, *7 (W.D. Okla. 2019)

3. "Undisputed evidence shows that during the NorthStar telemarketing campaign, Yodel made 77,912,856 calls using its soundboard system" on behalf of Northstar alone. *Id.* at *31-32.[4]

4. "The soundboard dialing system caused an invalid telephone number, which began with the same area code as the telephone number dialed, to display on the recipient's caller ID." *Exhibit 3 - Braver v. Northstar Alarm Servs., LLC*, 329 F.R.D. 320, 326 (W.D. Okla. 2018).

5. "The soundboard software . . . required Yodel's soundboard agents, located in a call center in India, to follow a script which instructed them to press buttons in a certain order

[4] Indeed, the evidence showed that Yodel's system often placed **more than a million calls in a single day**. *See Exhibit 4 - Braver v. Northstar*, 17-cv-383, Doc. 42-9.

thereby delivering prerecorded audio clips to the called party." *See Exhibit 1 - Braver v. NorthStar Alarm Servs., LLC*, 2019 U.S. Dist. LEXIS 118080, *7-8 (W.D. Okla. 2019).

6. "The undisputed audio recording of the initial Braver call shows that soundboard calls 'cannot interact with the customer except in preprogrammed [not to mention meaningless] ways'" *Id.* at *13.

The initial prerecorded messages played by the soundboard agents during the calls were part of an introductory script, which included several deceptive statements:

> "Hello this is Joe, I am with the **department of Home Security** for your neighborhood on a recorded line, how are you today?"
>
> "Okay, good, I am with the security help center and **the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood, have you been informed about that**?"
>
> "With crime rates and mass shooting on the rise in the US and national security with our borders, **you can see having false alarms with home security systems in your area can be a big concern, right**?"
>
> "So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for."

Exhibit 2 at p. 1. When asked about this deception in a deposition, Yodel's CEO testified the statements were "just sales language" and not based in fact. *Exhibit 5* at 105:24 – 106:13.

Other prerecorded messages played during the calls were also designed to deceive the consumer, hide Yodel's identity and the identity of Yodel's client, lie about where the calls are coming from, and even lie about the simple fact that prerecorded messages are being played.

> **Who are you calling for-** You know I don't have the specific information here in front of me, it's just my job to make sure all the homes in your neighborhood are aware of the technologies and security programs available in your area? Exhibit 2 at p. 6
>
> **Where get my info** Sorry I don't have exactly where your information came from I just have a message here that says there have been some false alarms with home security systems, in your Neighborhood and that is important to contact all the homeowners in your surrounding area, so now are you the homeowner? Id. at p. 8.

Where are you call I'm calling from Palm Harbor Florida. Id. at p. 7.

Is Human- Ha ha….You know, I've never had that question before. I do have to follow a strict script and ,uh, I guess I sound kind of strange sometimes! Id. at p. 5.

Despite the ruling of the court in *Braver v. Northstar et al* that Yodel's prerecorded soundboard calls violated the TCPA (see below), Yodel is continuing to inundate Americans with millions of prerecorded telemarketing calls using the same soundboard system and is continuing to hide its identity by spoofing fake local telephone numbers on caller id and by using aliases in its prerecorded messages. *See e.g, Person v. Lyft*, 19-cv-2914 (N.D. Ga.), Doc. 40 at ¶¶ 41-44; *Moore v. Club Exploria*, 19-cv-2504 (N.D. Ill.), Doc. 1 at ¶¶ 24-29. It now asks the Commission for a green light to continue this conduct, or, in the alternative, to absolve it of responsibility for its prior actions.

II. Yodel's Soundboard Calls Violate the Plain Language of the TCPA

Yodel asks the commission to declare that soundboard calls are not regulated by 47 U.S.C. § 227(b)(1)(B), which provides as follows:

> "It shall be unlawful for any person . . . to initiate any telephone call to any residential telephone line *using an artificial or prerecorded voice to deliver a message* without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B)"

In the Braver Litigation, Yodel argued, just as it does here, that this provision does not regulate the use of prerecorded voice messages in its soundboard calls because those prerecorded messages are played by a human being on the line and are not "fully automated." The court rejected Yodel's arguments. It found that Yodel's prerecorded soundboard calls violated the plain language of the provision because "the language of §227(b)(1)(B) is clear" and "says nothing about any requirement that there be no human interaction for §227(b)(1)(B) to apply."

See Exhibit 1 - Braver v. NorthStar Alarm Servs., LLC, 2019 U.S. Dist. LEXIS 118080, *13 (W.D. Okla. 2019).

Indeed, the plain language of the statute imposes different requirements on calls placed by "automatic telephone dialing systems" (in § 227(b)(1)(A)) than on calls that use a "prerecorded voice to deliver a message" in § 227(b)(1)(B). Unlike § 227(b)(1)(A), § 227(b)(1)(B) has no automation requirement whatsoever. On its face, § 227(b)(1)(B) prohibits the use of a prerecorded voice to deliver a message in a telemarketing call. If Congress's concern underlying this provision was about "fully automatic" systems, then it would have at the very least used the word "automatic" like it just did in the immediately preceding provision.

And beyond the plain language, the legislative history confirms that *Congress intended to regulate prerecorded messages played by "live" human beings* on the phone:

> "when a consumer answers the phone, a 'live' person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the 'live' caller may switch to a record-ed or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer."

Senate Committee Report, S. Rep. 102-178-1991 pg. 8; *see also* comments of Senator Hollings upon introduction and passage of S. 1462 (the TCPA) on November 7, 1991 (Senate Record 137-Cong. Rec. 16204, 1991) ("Such consent also could be obtained by a live person who simply asks the called party whether he or she agrees to listen to a recorded message.")

Yodel is asking the Commission to both disregard the plain language of the statute and the legislative will. Yodel claims that that this Commission has "consistently suggested the phrase 'using an artificial or prerecorded voice to deliver a message' in section 227(b)(1)(B) refers to calls that are *entirely prerecorded* and *fully automated* for more than 25 years." Pet. at p. 4. Yet not a single one of the FCC documents that Yodel cites actually says that, or anything

like it. Rather than imposing an "entirely prerecorded" or "fully automated" requirement that does not exist in the statute, this commission has instead repeatedly confirmed that it is simply unlawful to use a prerecorded voice to deliver telemarketing messages. *See. E.g. Citation to Direct Link, Inc., d.b.a. Live Link Technologies*, 21 FCC Rcd 3395 (March 31 2006) ("it is generally unlawful to use an artificial or prerecorded voice to deliver an advertisement or telephone solicitation to a residential telephone line . . .")' *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1838, ¶ 20 (February 15, 2012) ("we require prior express written consent for all telephone calls using an automatic telephone dialing system or a prerecorded voice to deliver a telemarketing message to wireless numbers and residential lines."); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961, 7967 (July 10, 2015) ("The TCPA and the Commission's implementing rules prohibit: (1) making telemarketing calls using an artificial or prerecorded voice to residential telephones without prior express consent and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a wireless telephone number without prior express consent"). Yodel's soundboard calls do exactly that.

Yodel claims that this commission's regulation at 47 C.F.R. § 64.1200(b)(2), which requires the disclosure of the caller's telephone number in "all artificial or prerecorded voice telephone messages" only applies to "fully automated robocalls." The scope of that rule, however, is not at issue here, and indeed the language differs substantially from § 227(b)(1)(B). Compare "prerecorded voice *telephone messages*" to "*using an artificial or prerecorded voice* to deliver a message." So even it were true that this Commission's disclosure requirement rule in 47 C.F.R. § 64.1200(b)(2) only applied to "fully automated robocalls," whatever that means, that

would say nothing about whether Congress's prohibition in section 227(b)(1)(B)'s against *using an artificial or prerecorded voice* to deliver a message without the prior express consent of the called party had the same limitation.

Next, Yodel claims that an appellate decision from 1995 (*Moser v. F.C.C.*, 46 F.3d 970 (9th 1995)) held that soundboard calls are not regulated by the TCPA. *Moser* made no such holding. Indeed, soundboard calls were simply not at issue in that case. In *Moser*, a telemarketing association sued the FCC arguing that the TCPA's prohibitions against prerecorded telemarketing calls to residential lines in 47 U.S.C. § 227(b)(1)(B) violated the First Amendment of the United States Constitution. *Id.* at 973. The Court rejected that argument because § 227(b)(1)(B)'s restrictions on calls to residential lines "leave open many alternative channels of communication." *Id.* at 975. It suggested that telemarketers could, for instance, still call residential numbers with "live solicitation calls", "taped messages to which consumers have consented," and "taped messages introduced by live speakers[.]" *Ibid.* Contrary to Yodel's claims, this does not suggest that soundboard calls are unregulated by the TCPA, instead, it simply reflects what Congress had already expressed in the legislative history – if a "live" person wants to play a prerecorded telemarketing message over the phone, then

> "when [the] consumer answers the phone, a 'live' person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the 'live' caller may switch to a record-ed or computerized message.

Senate Committee Report, S. Rep. 102-178-1991 pg. 8; *see also* comments of Senator Hollings upon introduction and passage of S. 1462 (the TCPA) on November 7, 1991 (Senate Record 137-Cong. Rec. 16204, 1991) ("Such consent also could be obtained by a live person who simply asks the called party whether he or she agrees to listen to a recorded message.")

There is no evidence that Yodel has ever attempted to do that in any of its soundboard calls. Indeed, the whole point of a soundboard system is to utilize the "cheap" labor of call center agents who cannot be understood by American consumers if they actually spoke on the phone. For the Braver campaign, Yodel paid its Indian contractor $2.00 per hour for the soundboard agents' labor, and that contractor of course paid the actual workers far less than that. Exhibit 5 at 95:25 – 96:10. If the call center agent can speak English clearly enough to ask for consent to play a prerecorded message, or indeed to interject with their own voice during the call, then there would be no reason to have them use a soundboard in the first place.

Yodel contends that soundboard helps live agents "respond in a dynamic and helpful way to questions and comments from the call recipient" and "assures human agents will not go 'off script' with improper, inaccurate, or incomplete assertions." But a soundboard system, by its very nature, artificially limits the ability of the agent to provide information. They can only respond with whatever prerecorded statements have been preloaded into the software, and thus will inevitably fail to address numerous questions or concerns stated by the consumer. The evidence developed in the Braver Litigation and collected by the Federal Trade Commission bear this out. Take Yodel's soundboard call to Mr. Braver, a transcript of which is attached hereto as Exhibit 6. It contained the following exchanges:

> BRAVER: Okay, and what company did you say you were with?
> PRERECORDED VOICE: Are you a US citizen?
> BRAVER: Uh yes, but what company did you say you were with?
> PRERECORDED VOICE: Does your home have at least two bedrooms? Exhibit 6 at 2:36-39.

> BRAVER: Well, I guess I'm still not understanding what's the issue? Issue with false alarms in the neighborhood. What is it about my neighborhood? Is what I am still not understanding. What is it about my neighborhood that's causing false alarms? I don't have any problems with that. That's why I am all confused here.

PRERECORDED VOICE: that's fine. Oh, and I almost forgot one last question. Now do you currently have a home security system ? *Id.* at 3:56-61.

BRAVER: Okay, well I, I don't understand your…I guess I don't know that you understood my question. So, you're talking about stuff that's specific to my area? What is that is different in my area verses other areas?
Pause
BRAVER: Hello? Are you there?
PRERECORDED VOICE: Okay.
BRAVER: Hello? *Id.* at 1:16-22.

PRERECORDED VOICE: Now, before we finish up, I want to check one last thing here. But I want to see if we have a specialist available now for you to speak with.
BRAVER: I don't have time for that right now.
PRERECORDED VOICE: Uh okay yeah. This is good, we do actually have someone that covers your area that we can connect you with right now. Hang on while I bring one of them on.
BRAVER: I don't have time for that right now.
PRERECORDED VOICE: Yes people are doing things that they normally wouldn't do. So, the crime rate is continuing to go up, but I can simply get you over to a specialist. If you don't like what you hear, then we can just shake hands and part as friends, okay?
BRAVER: Yeah, I don't have time for that right now, but you said someone would, could call me later? That would be fine.
Pause
PRERECORDED VOICE: Uh Hello, are you still there?
BRAVER: Yeah, I'm here. Like I said I don't have time. You said that someone could call me back at a later time. That would be alright, but I don't have time right now.
PRERECORDED VOICE: Uh yeah no. we're not going to be much longer.
BRAVER: Yeah I don't have time to talk. I have to go like right now. I got someone waiting on me. I don't have time to talk to anyone right now.
PRERECORDED VOICE: Look, I understand. A lot of people I talk to actually think…
PRERECORDED VOICE: Uh yeah no, were not going to be much longer.
BRAVER: Okay, I have to get off the phone now. Hello? Hello? Is anybody there? Hello? *Id.* at 3:70-90.

As FTC staff noted in the 2016 Opinion letter (exhibit 7):

"Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing

> "robot" calls. Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.4 Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion."

Exhibit 7 at pp. 1-2. The evidence here shows that the FTC staff was correct – soundboard technology utilizes prerecorded voice messages in a way that is harmful to consumers. There is no reason to remove the prerecorded voice messages played by soundboard systems from the scope of § 227(b)(1)(B), which plainly prohibits the use of a prerecorded voice to deliver a message in any telemarketing call.

III. Yodel is Not Entitled to a Retroactive Waiver

In the alternative, Yodel contends the Commission should grant it a retroactive waiver "for any claims of TCPA violations prior to May 12, 2017." Pet. at p. 9. Yodel is not entitled to such a waiver.

While the Commission may in certain circumstances (discussed below) issue waivers for violations of its own rules, it is not empowered to waive **statutory** requirements. Yet that is exactly what Yodel is requesting here.[5] On its face, 47 C.F.R. § 1.3 only authorizes the FCC to waive provisions of the Code of Federal Regulations: "*The provisions of this chapter* may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter.") Thus, the Commission may only "waive requirements not mandated

[5] The Public Notice issued regarding Yodel's petition acknowledges this: "Yodel requests that the Commission grant a retroactive waiver of the TCPA's prerecorded call prohibitions for Yodel's use of soundboard technology prior to May 12, 2017." CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITION FOR DECLARATORY RULING OR RETROACTIVE WAIVER FILED BY YODEL TECHNOLOGIES LLC, CG Docket No. 02-278 (September 19, 2019), https://ecfsapi.fcc.gov/file/091904157951/DA-19-931A1.pdf

by statute[.]" *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009) (emphasis added); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2015) ("[T]he FCC cannot use an administrative waiver to eliminate *statutory* liability in a private cause of action[.]") (emphasis added).

The Commission recognized this limitation on its authority when it denied a similar request for waiver of the TCPA's requirements. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition of Kohll's Pharmacy & Homecare, Inc. for Declaratory Ruling and Waiver, CG Docket No. 02-278, Order, 31 FCC Rcd 13289, ¶13 n.55 (Dec. 21, 2016) ("To the extent [the petitioner] seeks a waiver of section 227(b)(1)(C) of the Act, the Commission may not grant this request because the Commission may not waive statutory requirements.") Given that Yodel is seeking a waiver for violations of the statute itself, the Commission must deny the request.

Yodel's request for a waiver should also be denied because it doesn't qualify for a waiver in any case. "[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164 (1990), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). The applicant for a waiver "faces a high hurdle" and "must plead with particularity the facts and circumstances which warrant" the waiver. *WAIT Radio*, 418 F.2d at 1157. Moreover, the public interest served by a waiver must "not undermine the policy, served by the rule" sought to be waived. *Id.* Yodel fails to satisfy this standard here.

First, Yodel has not even identified any particular rule of this Commission that it wants to be waived. It makes vague references to 47 C.F.R. § 64.1200(a)(1), but that subsection has nothing to do with calls to residential telephone lines (at issue in Braver), and itself encompasses

numerous rules applicable to calls to emergency lines, hospitals, and cell phones. None of these rules has anything to do with the scope of Yodel's petition – "the application of 47 U.S.C. § 227(b)(1)(B)," so it is entirely unclear what Yodel is even asking this commission to do other than just waive the TCPA entirely.

Second, compounding its failure to identify what rule it wants to be waived, Yodel completely fails to "plead with particularity the facts and circumstances" justifying a waiver. It presents no evidence whatsoever that Yodel *in fact* was under the impression that its conduct actually complied with the TCPA. The evidence that *is* before the Commission shows the opposite – it shows that Yodel had a guilty mind and knew it was violating the law. It shows that Yodel sought to conceal its identity in numerous ways. It shows that Yodel lied to the call recipients about the very fact that it was using prerecorded messages in its calls. These facts do not justify a waiver.

Finally, a waiver would not serve any public interest and would undermine the whole purpose of the TCPA and this Commission's rules. Congress found that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits *legitimate telemarketing practices*" Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394 (emphasis added). Yodel is not engaging in legitimate telemarketing practices and at least two state attorneys general have recently taken steps to stop it.[6] Yodel's massive telemarketing operation is invading the privacy rights of millions of Americans whose personal data is bought

[6] *See Two Companies to Pay $110,000 after robocalling Pennsylvanians, AG Shapiro says*, Philadelphia Inquirer (June 25, 2019), available at https://www.inquirer.com/business/robocalls-pennsylvania-attorney-general-josh-shapiro-20190625.html; *Call it Quits, Robocall Crackdown 2019, Federal, State and Local Actions*, Federal Trade Commission (June 25, 2019) at p. 21, available at https://www.ftc.gov/system/files/attachments/press-releases/ftc-law-enforcement-partners-announce-new-crackdown-illegal-robocalls/operation_call_it_quits_actions_list_6-25-19.pdf

and sold by entities they have never even heard of. Yodel is burdening them with deceptive, unresponsive, and annoying prerecorded messages that are regulated by the plain language of the TCPA. The Commission should deny Yodel's petition.

Respectfully submitted,

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, for himself and all individuals similarly situated, Plaintiff, -vs- NORTHSTAR ALARM SERVICES, LLC, et al., Defendants.	)	Case No. CIV-17-0383-F

ORDER

I. Introduction

In this action, Robert H. Braver alleges, for himself and on behalf of the class the court has certified under Rule 23, that Yodel Technologies, LLC, initiated telemarketing calls on behalf of NorthStar Alarm Services, LLC, in a manner which violated the Telephone Consumer Protection Act (TCPA) and regulations implemented thereunder.

Braver appears on his own behalf and on behalf of the class with respect to count one, and appears on his own behalf with respect to count three.[1] Yodel is a company which allegedly provides telemarketing services to its clients. Defendants

[1] After the parties filed a joint stipulation dismissing count two, the First Amended Complaint (doc. no. 7) was deemed amended to delete count two. Doc. no. 54. No motion to certify was filed as to count three, and the deadline for such a motion has passed. Doc. no. 32. Accordingly, the class action allegations in count three are moot.

describe Yodel's business as "qualifying leads" (prospects) for its clients.[2] NorthStar is (or was) one of Yodel's clients. NorthStar provides residential security and home automation systems to consumers.

Cross-motions for summary judgment are before the court.

Braver moves for summary judgment on his own behalf and on behalf of the class.[3] He seeks summary judgment against both defendants "for their violations of the TCPA."[4] Braver's motion, however, presents no developed argument with respect to count three. NorthStar filed a response brief.[5] Braver filed a reply brief.[6]

NorthStar moves for summary judgment on counts one and three.[7] Braver has responded[8] and NorthStar has replied.[9]

Yodel moves to join NorthStar's motion for summary judgment. Doc. no. 123. No party responded to Yodel's motion, which is broadly construed as a motion seeking leave to join in all of NorthStar's motion papers currently before the court, specifically, NorthStar's motion for summary judgment, NorthStar's reply brief, and NorthStar's brief in response to Braver's motion for summary judgment. The court construes Yodel's motion in this manner because the arguments made by NorthStar in all of these papers overlap and because it appears this was Yodel's intent. The

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[2] Doc. no. 124, p. 9. Except for depositions, this order cites documents by their ecf page numbers at the top of each as-filed page. Depositions are cited by their original page numbers.

[3] Doc. no. 117.

[4] Doc. no. 117, p. 6.

[5] Doc. no. 124.

[6] Doc. no. 130.

[7] Doc. no. 120.

[8] Doc. no. 127.

[9] Doc. no. 132.

court is confident, for example, that Yodel did not intend to confess Braver's motion for summary judgment by failing to respond to it.

For the reasons stated in this order, Braver's motion for summary judgment will be granted on count one and otherwise denied. NorthStar's motion for summary judgment, joined in by Yodel, will be granted on count three and otherwise denied.

II. The Claims

The court previously dismissed any direct liability claims alleged against NorthStar, ruling that any potential liability on NorthStar's part must be based on its alleged vicarious liability for Yodel's acts.[10] At this stage, Braver argues that Yodel has direct liability on both of the remaining counts and that NorthStar has vicarious liability on those counts.

Count One.

Count one alleges that defendants violated the TCPA, specifically 47 U.S.C. § 227(b)(1)(B), and the Federal Communications Commission's implementing regulation at 47 C.F.R. § 64.1200(a)(3).

Section 227(b)(1)(B) provides that it shall be unlawful for any person within the United States:

> to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party….[11]

Regulation 47 C.F.R. § 64.1200(a)(3) limits the application of §227(b)(1)(B) to telemarketing calls and requires prior express written consent of the called party, providing as follows.

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[10] Doc. no. 27, p. 7.

[11] Exceptions apply but are not material.

> No person or entity may…[i]nitiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call…is not made for a commercial purpose; [or] [i]s made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing….

47 C.F.R. § 64.1200(a)(3)(ii),(iii).

Braver contends that defendants violated these provisions by making telemarketing calls on the residential phone lines of Braver and the class, using soundboard technology to deliver prerecorded messages to persons with whom defendants had no prior relationship and from whom prior consent had not been obtained.

Count Three.

Count three alleges that defendants violated 47 C.F.R. § 64.1200(d), which provides as follows.

> No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:
>
> (1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list. …
>
> (4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The

> telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

Braver contends that defendants violated this regulation in two ways: by initiating calls without first having implemented an effective written policy meeting the regulatory standards, and by failing to provide the called party (Braver) with the required identifying information.

III. Standards

Under Rule 56, Fed. R. Civ. P., summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In determining whether a genuine issue of a material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). All reasonable inferences to be drawn from the undisputed facts are to be determined in a light most favorable to the non-movant. United States v. Agri Services, Inc., 81 F.3d 1002, 1005 (10th Cir. 1996). Once the moving party has met its burden, the opposing party must come forward with specific evidence, not mere allegations or denials, demonstrating that there is a genuine issue for trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). A scintilla of evidence is not sufficient to defeat a motion for summary judgment; there must be sufficient evidence on which a jury could reasonably find for the non-moving party. Manders v. State of Oklahoma ex rel. Dept. of Mental Health, 875 F.2d 263, 265 (10th Cir. 1989), superseded by statute on different issue, quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986).

Facts set forth in the statement of the material facts of the movant may be deemed admitted for the purpose of summary judgment unless specifically controverted by the nonmovant using the procedures set forth in the court's local rules. LCvR56.1(e). Those procedures require the nonmovant to cite evidentiary material in support of its position. *Id*. Accordingly, this order sometimes characterizes a fact as undisputed although the nonmovant purports to dispute it. The court only does so if it has found, based on its review of the record, that the nonmovant did not carry its burden to raise a genuine dispute.

IV. Background Facts

There is no dispute about the following matters. (Additional facts are stated elsewhere in this order.)

Yodel's Soundboard Technology.

Yodel's automated predictive dialer initiated the calls in question in this action.[12] A computer dialed the telephone number, detected whether it was answered by a potential customer and, if so, transferred[13] the connected call to a soundboard agent who was trained to play prerecorded wav files (audio files) to deliver messages to the called party by pressing buttons.[14]

The soundboard software (referred to by Yodel as "the Yodel Dialer")[15] required Yodel's soundboard agents, located in a call center in India,[16] to follow a

[12] Doc. no. 117, p.9, ¶16.

[13] Some leads were transferred to NorthStar and some were called back by NorthStar.

[14] *Id*. at ¶16.

[15] Doc. no. 117-3, p. 97.

[16]There is no dispute that Yodel is responsible for the material acts of the soundboard agents who worked at the call center.

script which instructed them to press buttons in a certain order thereby delivering prerecorded audio clips to the called party.[17]

After answering the initial call, the first thing a called person (*i.e*. a lead or a prospect) heard was a prerecorded voice stating: "Hello this is [Amy],[18] I am security advisor, can you hear me okay?"[19] During the course of the telemarketing campaign, there was some variation in how a lead was provided to NorthStar (some leads were handed off as a "warm transfer," meaning with the called person still on the line, and some leads were called back by NorthStar), but every initial call began with the soundboard agent (Yodel's agent) playing the first recording.[20]

The Class.

On October 15, 2018, the court certified the following class and subclass.[21]

> Class: All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 20 or 50 to the call, and that resulted in the normal clearing disposition.

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[17] *Id*. at p. 9, ¶¶13, 16.

[18] The name varied. "Amy," "Joe" and "Billy" were also used. Doc. no. 117, p. 9, ¶17, n.1.

[19] *Id*. at p. 9, ¶17.

[20] *Id*. at p. 9, ¶ 18. Defendants do not dispute the assertions by Braver as set out in ¶ 18 of doc. no. 117, p. 9. *See*, defendants' response to ¶ 18 at doc. no. 124, p. 13. Thus, defendants do not dispute that "every call began with the soundboard agents playing the first recording." Nevertheless, the court notes that elsewhere in the briefing papers, defendants point to testimony by Yodel's Rule 30(b)(6) witness that he had heard that new soundboard agents sometimes made an error and transferred a call without playing a script. Doc. no. 121-4, pp. 57-59. It is not clear whether the witness was speaking of instances specific to the NorthStar campaign. Moreover, this testimony is vaguely sourced (to "reports," "things of that nature," what "we've heard from quality control agents" at pp. 57-58) and is hearsay.

[21] Doc. no. 72, pp. 26-27.

> Subclass:
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 50 to the call, and that resulted in the normal clearing disposition.
>
> Excluded from the class are:
> Any persons whose contact information is associated with either an IP address or website URL in the Red Dot Data marketing list.

Braver's expert analyzed call records and identified 239,630 persons who meet the class definition and 47,398 persons who meet the subclass definition. In doing so, he removed any call records where there was any possibility that no prerecorded message played. As a result of this approach, the total set of 78 million call records was narrowed to 252,765 calls at issue for the class.[22]

Calls to Braver.[23]

On August 26, 2016, Braver received a telephone call on his residential phone number. The call used the soundboard system. In that call, the soundboard agent pressed buttons which delivered prerecorded voice messages and thus could not answer Mr. Braver's basic questions about who was calling or why Braver's telephone number had been dialed. Prior to receiving the call, Braver had no relationship with NorthStar. Like the other class members, Braver is in the Red Dot Data marketing list which Red Dot Data sold to Yodel.

Matters Expressly Conceded by Defendants.[24]

Defendants concede Yodel initiated the calls to plaintiff and to the class.

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[22] Doc. no. 117, p. 17, ¶¶ 65-67; doc. no. 124, p. 23, ¶¶ 65-67.

[23] For all of the facts stated in this paragraph, *see* doc. no. 117, pp. 17-18, ¶¶ 68-71; doc. no. 124, pp. 23-24, ¶¶ 68-71. Recordings of two calls to Braver are in the record. Doc. nos. 117-11, -12 (audio recordings), doc. no. 119 (notice of conventional filing).

[24] For all of these concessions, *see* doc. no. 124, p. 26.

Defendants concede Yodel did not obtain consent from the called parties prior to initiating calls to plaintiff and the class.

Defendants concede that the calls constituted telemarketing under the TCPA.

Defendants concede that at least some of the telephone numbers called were residential numbers.

V. Count One

Given these concessions, defendants raise just two issues with respect to count one. Defendants argue that the calls initiated by Yodel to generate leads as part of the NorthStar telemarketing campaign are not calls which "deliver a message" within the meaning of §227(b)(1)(B). This issue is addressed in Part A, below. Defendants also argue that NorthStar is not vicariously liable for Yodel's material acts. This issue is addressed in Part B, below.

A. Calls Delivered "a Message" Within the Meaning of §227(b)(1)(B).

As previously stated, §227(b)(1)(B) provides that it shall be unlawful:

> to initiate any [telemarketing] telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.

Defendants contend that §227(b)(1)(B)'s use of the singular in the phrase "to deliver a message," shows the statute does not regulate, and was not intended to regulate, interactive exchanges of information which defendants contend do not deliver "a message" but instead deliver messages - plural. Defendants argue: "Put simply: while soundboard technology may use audio clips containing 'artificial or prerecorded voices,' those clips do not 'deliver a message.' Thus, these calls do not contravene the TCPA's prohibition on using prerecorded voices to deliver a message."[25]

[25] Doc. no. 120, p. 11.

Title 1 U.S.C. § 1 provides that "In determining the meaning of any Act of Congress, unless the context indicates otherwise…words importing the singular include and apply to several persons, parties, or things…."[26] Nothing about the context of §227(b)(1)(B) suggests a different result here.[27]

Defendants argue that if Congress had intended § 227(b)(1)(B) to apply to calls which delivered multiple messages, Congress knew how to so provide. Defendants cite restrictions against making "any call…using any automatic telephone dialing system or an artificial or prerecorded voice" (to a patient room of a hospital) per 47 U.S.C. §227(b)(1)(A)(ii). Defendants also cite the TCPA's creation of a private right of action under §227(c)(5) for persons who receive "more than one telephone call within any 12-month period by or on behalf of the same entity" in violation of regulations prescribed under that subsection. These arguments are unpersuasive given the plain language and meaning of § 227(b)(1)(B), together with the principle of statutory construction embodied in 1 U.S.C. § 1.

The court also rejects defendants' argument that the statute's use of the singular shows it was not intended to regulate a soundboard system that involves human interaction. Defendants argue that phrases in the statute such as "initiate any telephone call" and "deliver a message" imply no human interaction in the message-

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[26] Title 1 U.S.C. § 1 also provides that "unless the context indicates otherwise…words importing the plural include the singular." United States v. Foote, 413 F.3d 1240, 1246 (10th Cir. 2005), held that nothing in the plain language of the Counterfeit Trademark Act, which prohibits traffic in "goods," required a defendant to traffic in more than one counterfeit good, citing 1 U.S.C. § 1. *And see*, Schott v. C.I.R., 319 F.3d 1203, 1206 (9th Cir. 2003) ("singulars normally include plurals, just as 'he' normally includes 'she,' " citing 1 U.S.C. § 1).

[27] The meaning of § 227(b)(1)(B) would be clear even without 1 U.S.C. § 1 based on the common understanding of the English language. For example, if someone asks, "Was there a thunderstorm yesterday?", the answer will be "yes" whether there was one thunderstorm or two. Similarly, if someone asks, "Did that telephone call deliver a prerecorded message?", the answer will be "yes" whether the call delivered one prerecorded message or several.

delivery system. As further support, defendants' response brief cites[28] In re TCPA of 1991, 7 FCC Red 2736 (June 25, 1992), which states: "The legislative history of the TCPA also reflects the premise that auto dialer generated calls are more intrusive to the privacy concerns of the called party than live solicitations."[29] Defendants also cite legislative history in their own moving brief.[30]

The court notes the statements of congressional purpose relied on by defendants. This legislative history, however, does not limit the plain language of

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[28] Doc. no. 124, p. 20.

[29] *Id*. at 2740, ¶ 25.

[30] Doc. no. 120, p. 34, cites S. Rep. 102-178 at 4-5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972 (1991), as follows.

> These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or voice recording service, and do not disconnect the line even after the customer hangs up the telephone.

Defendants argue that soundboard calls do not offend these congressional concerns. But the undisputed audio recording of the initial Braver call shows that soundboard calls "cannot interact with the customer except in preprogrammed [not to mention meaningless] ways," which is one of the congressional concerns cited above. The following excerpts from the Braver call illustrate the point.

> BRAVER: Okay, and what company did you say you were with?
> PRERECORDED VOICE: Are you a US citizen?
> BRAVER: Uh yes, what company did you say you were with?
> PRERECORDED VOICE: Does your home have at least two bedrooms?
> …
> BRAVER: Well I guess I'm still not understanding the issue with false alarms in my neighborhood. What is it about my neighborhood? I'm still not understanding. What is it about my neighborhood that's causing false alarms? I don't have any problems with that. That's why I am all confused here.
> PRERECORDED VOICE: That's fine. Oh, and I almost forgot one last question. Now do you currently have a home security system?

Doc. no. 117-11, notice of conventional filing at doc. no. 119.

§227(b)(1)(B), which says nothing about any requirement that there be no human interaction for §227(b)(1)(B) to apply. Even more fundamentally, the language of §227(b)(1)(B) is clear, and there is no reason to resort to legislative history to determine its meaning. *See*, Edwards v. Valdez, 789 F.2d 1477, 1481 (10th Cir. 1986) ("When the meaning of a statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent").

Defendants argue that their interpretation of § 227(b)(1)(B) avoids conflict with other provisions of the TCPA. For example, they note that 47 U.S.C. §227(d)(3)(A) requires callers to include certain identifying information at the beginning of all prerecorded messages.[31] They argue that if soundboard technology is considered to be the delivery of a prerecorded message, then under § 227(d)(3)(A), call recipients would be required to listen to the same identification information before each and every audio clip played during a call, an obviously absurd result. The court rejects this argument as a basis for construing § 227(b)(1)(B). Congress is entitled to some flexibility of language so long at its meaning is clear.

Defendants' other arguments are also unpersuasive. Defendants argue that their interpretation of §227(b)(1)(B) avoids a conflict with the Federal Trade Commission's Telemarketing Sales Rule's call-abandonment provisions. Braver responds by arguing that defendants misstate the rule. Regardless, this court is not required to ignore the plain meaning of §227(b)(1)(B) to avoid bumping up against an FTC rule not in dispute in this action. Defendants argue that if §277(b)(1)(B) is construed to apply to calls that involve human interaction and prerecorded messages, then the statute will apply whenever a prerecorded message is used in an otherwise

[31] Section 227(d)(3)(A) provides: "[A]ll artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual…."

live call so that common prerecorded messages (such as "this call may be monitored," hold music or hold messages) will violate § 227(b)(1)(B) when played during these otherwise live calls. Section 227(b)(1)(B), however, applies only to telemarketing calls, a fact which largely answers this argument. Similarly, defendants argue that if §227(b)(1)(B) is construed as Braver contends, the statute will preclude telemarketing calls placed by a disabled person who uses a voice generator as an "artificial voice." This action involves a "prerecorded voice," not an "artificial voice." Moreover, the bigger point with respect to all of these types of arguments is that they are too remote from the facts of this case to be persuasive.

After careful consideration, the court rejects defendants' argument that the calls initiated by Yodel did not deliver a message within the meaning of §227(b)(1)(B).[32] This conclusion -- together with the matters which have been expressly conceded by the defendants (Yodel initiated the calls to plaintiff and the class, consent was not obtained, the calls constituted telemarketing calls, and at least some of the telephone numbers called were residential numbers) -- means that liability has been established on the part of Yodel with respect to count one. There is no genuine issue with respect to the fact that Yodel initiated telephone calls to residential telephone lines using a prerecorded voice to deliver a message without the prior express consent of the called party. With respect to the claims alleged against Yodel in count one, Braver and the class are entitled to summary judgment in their favor.

NorthStar's potential liability on count one depends on vicarious liability, addressed next.

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[32] Courts which have ruled in favor of plaintiffs in TCPA cases that involve technology similar to the soundboard technology involved in this case include: Margulis v. Eagle Health Advisors, LLC, 2016 WL 1258640, *3 (E.D. Mo. March 31, 2016) (claim stated under TCPA); Bakov v. Consolidated World Travel, 2019 WL 1294659, **3, 22 (N.D. Ill. March 21, 2019) (class certified for Illinois residents).

B. NorthStar Is Vicariously Liable on Count One.

As recognized by the United States Supreme Court, the Federal Communications Commission has ruled that under federal common-law principles of agency, there may be vicarious liability for TCPA violations. Campbell-Ewald Co. v. Gomez, 84 USLW 4051, 136 S. Ct. 663, 674 (2016), referencing In re Joint Petition Filed by Dish Network, LLC, et al. for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules, 28 F.C.C. Rcd. 6574 (2013), hereafter "May 2013 FCC Ruling."[33] The May 2013 FCC Ruling states: "we clarify that a seller is not directly liable for a violation of the TCPA unless it initiates a call, but may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer." May 2013 FCC Ruling at 6582, ¶24. The May 2013 FCC Ruling then sets out three potential agency theories under which a non-caller (such as NorthStar) may be vicariously liable for the TCPA violations of a direct caller (such as Yodel): actual agency, also referred to as classical agency; apparent authority; and ratification.

The classical definition of agency contemplates the fiduciary relationship which arises[34] when one person (principal) manifests assent to another person (agent) that the agent shall act on the principal's behalf and subject to the principal's control.[35] Plaintiff must show that the principal controlled or had the right to control

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[33] The FCC has agreed that guidance in the May 2013 FCC Ruling regarding how common law agency principles may apply to these types of TCPA cases is not binding on courts, is not entitled to Chevron deference, and is guidance which depends on its power to persuade. Dish Network, LLC v. Federal Communications Com'n, 552 Fed. Appx. 1 (D.C. Cir. 2014).

[34] It is not necessary to show a fiduciary relationship to establish that an agency exists; rather, fiduciary duties arise as a result of circumstances establishing the agency relationship. 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229, 1250 (10th Cir. 2013).

[35] May 2013 FCC Ruling at 6586, ¶ 34.

the purported agent. Restatement (Third) of Agency §1.01 cmt. f (1) (2006) ("essential element of agency is the principal's right to control the agent's actions");[36] Mey v. Venture Data, LLC, 245 F.Supp.3d 771, 787 (N.D. W. Va. 2017). The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority. Restatement (Third) of Agency § 1.01 cmt. f (1). In the TCPA context, some courts have characterized the control necessary to establish agency as control over the manner and means of the agent's calling activities. Mey at 787. Citing Mey,[37] defendants argue that a "manner and means" test applies. Defendants also argue that agency requires more than mere passive permission, as it involves request, instruction or command.[38] The court will presume for purposes of argument that all of these requirements apply.

With this understanding of classical agency in mind, the court finds the following facts based on undisputed evidence.

1. In or around February of 2016, NorthStar hired Yodel to generate qualified leads for NorthStar. This relationship lasted until October 2016.[39]

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[36] Federal courts have looked to the Restatement (Third) of Agency (2006) as the source of federal agency principles. Hodgin v. UTC Fire & Security Americas Corp., Inc., 885 F.3d 243, 252 (4th Cir. 2018). The Tenth Circuit cites the Restatement in 1-800 Contacts Inc. v. Lens.com, Inc., 722 F.3d 1229, 1250-51 (10th Cir. 2013). Whenever this order cites the Restatement, it cites the 2006 edition.

[37] Doc. no. 124, p. 17, ¶ 32.

[38] Doc. no. 120, p. 22.

[39] Doc. no. 120, p. 12, ¶¶ 4-5; doc. no. 127, p. 8, ¶¶ 4-5.

2. NorthStar was involved in determining the script for the prerecorded messages used by Yodel in the calls which Yodel made in order to provide NorthStar with qualified leads.

--Before calls were placed by Yodel as part of the NorthStar telemarketing campaign, NorthStar listened to prerecorded audio clips and reviewed a sample soundboard script, all of which were provided by Yodel (which had used them for another security company).[40] When NorthStar's witness was asked if Bates No. 107 was the script "that Yodel provided to NorthStar to show what the prerecorded Avatar would be saying," the witness answered "Yes."[41]

--When NorthStar's witness was asked whether NorthStar ultimately approved the script to be used in telephone calls, the witness testified: "We didn't object to them using it, but it wasn't understood that we would have to approve it as far as I know."[42] The questioner then asked, whether, at some point, NorthStar told Yodel to begin making calls, and whether, at that point, "approval was made with the understanding that they [Yodel] would be using this script shown at Bates No. 107," to which the witness answered "correct."[43] Thus, NorthStar told Yodel to begin making calls with the

[40] Doc. no. 117, p. 8, ¶¶ 9-11; doc. no. 124, pp. 10-11, ¶¶ 9-11 (not disputing text of script).

[41] Doc. no. 117-1, p. 67 (deposition cited by all parties).

[42] *Id*. at p. 67.

[43] *Id.*

understanding that the script to be used in those calls was a script substantially similar[44] to the script NorthStar had reviewed.

--The script reviewed by NorthStar and ultimately used in the NorthStar campaign was substantially as set out below.[45] Each numbered paragraph reflects a separate, prerecorded wav file to be played by the soundboard agent.[46]

> 1. Intro: Hello this is [Amy],[47] I am security advisor, can you hear me okay?
>
> 2. Purpose: Okay, good, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood, have you been informed about that?
>
> 3. Security Concern: With crime rates and mass shooting on the rise in the US and national security with our borders, you can see having false alarms with home security systems in your area can be a big concern right?
>
> 4. My job: So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for. Are you the homeowner? …

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[44] Doc. no. 127-3, p. 114 ("substantially similar").

[45] The fact that "Amy's" prerecorded pitch is plainly deceptive in some respects (to the point of being predatory when heard by credulous or otherwise vulnerable listeners) is eye-catching, but ultimately immaterial to the court's analysis of the issues addressed in this order.

[46] Doc. no. 117, p. 8, ¶ 11; doc. no. 124, p. 11, ¶ 11 (not disputing text of script). The court presumes there were other audio clips but makes no finding as to whether NorthStar reviewed other clips.

[47] As previously stated, the fictional name varied.

> 9. . . . [T]he system you prequalify for is full color, touch screen, and has the ability to use home automation products like wireless door locks, … cameras, and thermostats that you can control from your cell phone.

--The script's description of the security system which the called person prequalified for -- a "full color, touch screen" system, with "the ability to use home automation products like wireless door locks," "cameras," "and thermostats that you can control from your cell phone" -- is an accurate description of a system NorthStar provides,[48] further confirming that NorthStar was involved in determining the script.

--On at least one occasion Yodel made a change in the script (a correction or fix), in response to an inquiry from NorthStar. Yodel took out a reference to an incorrect area code after NorthStar stated as follows in an email: "We need to follow the script outlined [by Yodel], and I thought we took out the 214 area code scripting. We [NorthStar] use a local touch dialer and it will most likely not be a 214 area code."[49]

3. NorthStar was aware that Yodel intended to use, and did use, soundboard technology to deliver prerecorded voices in audio clips which were played to the person receiving the call.[50]

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[48] Doc. no. 117, p. 8, ¶ 12; doc. no. 124, p. 11, ¶ 12.

[49] Doc. no. 117, p. 13, ¶ 41, citing doc. no. 117-37; doc. no. 124, pp. 19-20, ¶ 41.

[50] Doc. no. 117, p. 8, ¶ 10; doc. no. 124, p. 11, ¶ 10.

--When the questioner asked Yodel's witness, "So they [NorthStar] understood that a prerecorded voice would be used during calls?" the witness answered (over an objection as to form), "They understood how the sound board technology worked, yes."[51]

4. Yodel and NorthStar understood that the qualified leads Yodel generated using the prerecorded soundboard system would be provided to NorthStar by one of two means.

--Called parties were either transferred by Yodel to NorthStar as "warm transfers" which NorthStar accepted to solicit customers for its security systems, or the parties called by Yodel were called back by NorthStar for that purpose.[52]

5. In their communications with the persons called, both Yodel and NorthStar made statements which identified the initial call as being from the "Security Help Center" (a fictional alias for Yodel and its soundboard agents).

--NorthStar knew the persons placing the calls for Yodel had identified themselves to the called persons as being with the "Security Help Center." NorthStar, in its follow-up conversations with the persons called, also referred to Yodel as the "Security Help Center."[53] This demonstrates coordination between Yodel and NorthStar. It also shows that NorthStar made statements

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[51] Defendants cite this testimony in their own motion for summary judgment, doc. no. 120, p. 15, ¶ 25, citing doc. no. 121-3, p. 52.

[52] Doc. no. 124, p. 10, ¶6.

[53] Doc. no. 117, p. 10, ¶¶ 20-21; doc. no. 124, p. 13, ¶¶ 20-21.

to the persons called, linking the different stages of the calls in the mind of the called persons.

6. NorthStar received a few complaints from consumers, which stemmed from calls placed by Yodel.[54] *NorthStar had a policy for what was supposed to be said when someone complained about the "robocall."*[55]

7. At times, NorthStar caused Yodel to change its procedures.

--After one complaint received by NorthStar, Yodel investigated, at NorthStar's request, how the complaining person had known that leads were being sent to NorthStar if the complaining person knew only that he or she was receiving a call from the "Security Help Center." A NorthStar email to Yodel stated, "I am feeling exposed, please advise."[56] Yodel responded, "I will look into it. We do not use the term NorthStar to anyone so I will see what happened." Yodel reported back that "our inbound has been giving your [NorthStar's] 877 number as a call back number" but that it was a rare situation, and it "won't happen again."[57] Thus, Yodel corrected its procedure

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[54] Defendants contend some of the complaints may have been associated with Yodel's calls for other companies, which the court accepts.

[55] Doc. no. 124, pp. 13-14, ¶ 22.

[56] NorthStar argues that this comment did not mean NorthStar felt exposed based on Yodel's use of soundboard technology. NorthStar contends that the author of the email felt exposed because the complaining customer was threatening to post negative information about NorthStar which would be damaging to NorthStar's reputation. The court accepts NorthStar's interpretation.

[57] Doc. no. 117, p. 11, ¶ 24 citing doc. no. 117-17; doc. no. 124, p. 15, ¶ 24.

in response to an inquiry from NorthStar about a complaint NorthStar had received from a person called by Yodel.

--At some point[58] NorthStar decided on a transfer procedure rather than having NorthStar simply call back the leads which Yodel had generated with its soundboard calls.[59] NorthStar requested this change because NorthStar believed the transfer model would be more profitable. Yodel implemented the transfer process which NorthStar requested.[60]

--NorthStar gave Yodel information about NorthStar's expectations regarding the rate of transfers, and Yodel acquiesced. In an email of March 11, 2016, NorthStar requested "Lets [sic] start with 2 transfers per hour during 9-5 m-f," and Yodel acquiesced.[61] On March 31, 2016, NorthStar emailed Yodel, "would like to pause for now," and again Yodel acquiesced.[62] On June 2, 2016, NorthStar sent an email to Yodel stating "lets [sic] ramp up the transfers."[63] In an email of August 26, 2016, Yodel emailed NorthStar, "[P]lease give me a call, volume has greatly increased, want to talk to you

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[58] Defendants contend Yodel began transferring warm calls to NorthStar in late May of 2016. Doc. no. 124, p. 17, ¶ 32. The court accepts that date.

[59] Defendants argue that procedures relating to transfers or call-backs are not material as they had nothing to do with the TCPA violations alleged in count one. If the court is incorrect and this type of evidence should not be considered, the result stated in this order (vicarious liability exists) would remain the same.

[60] Doc. no. 117, p. 12, ¶¶ 32-33; doc. no. 124, p. 17, ¶¶ 32-33.

[61] Doc. no. 117, p. 12, ¶ 34, doc. no. 117-26; doc. no. 124, pp. 17-18, ¶ 34.

[62] Doc. no. 117, p. 12, ¶ 36, doc. no. 117-28; doc. no. 124, p. 18, ¶ 36.

[63] Doc. no. 117, p. 13, ¶ 37, doc. no. 117-29; doc. no. 124, p. 19, ¶ 37.

before we start reducing, because its [sic] hard to get it back up where its [sic] at." NorthStar emailed Yodel back, "I understand, but we need to keep at 60 for time being."[64]

8. NorthStar had some involvement in determining to which telephone numbers calls would be placed by Yodel.

--NorthStar gave Yodel a list of the zip codes to which the calls should be made; the listed zip codes were those in which NorthStar did business.[65] Yodel's witness was asked at his deposition, "So NorthStar provided the list of zip codes, then you used that list of zip codes to obtain the marketing leads from the two marketing companies we discussed; is that right?" The witness answered, "Yes."[66]

--Five different times NorthStar requested that Yodel stop calling certain numbers and asked that Yodel add those telephone numbers to Yodel's internal do not call list, which Yodel did.[67]

--Twice, NorthStar instructed Yodel that some customers were receiving multiple calls, after which Yodel took steps to stop repeating calls.[68]

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[64] Doc. no. 117, p. 12, ¶ 35, doc. no. 117-27; doc. no. 124, p. 18, ¶ 35.

[65] Doc. no. 117, p. 13, ¶ 38, citing doc. no. 117-1, p.73; doc. no. 124, p. 19, ¶ 38. Defendants' own motion (doc. no. 120, p. 15, ¶ 25) concedes NorthStar provided zip code and demographic information to Yodel.

[66] Doc. no. 121-3, p. 139, cited by defendants in doc. no. 120, p. 15, ¶ 25.

[67] Doc. no. 117, p. 13, ¶ 39; doc. no. 124, p. 19, ¶ 39.

[68] Doc. no. 117, p. 13, ¶ 40; doc. no. 124, p. 19, ¶ 40.

9. NorthStar and Yodel agreed to a change in the compensation structure, which NorthStar hoped would make the campaign financially viable. Approximately one month later NorthStar terminated Yodel's services.

> --In late September 2016, approximately one month before NorthStar terminated Yodel, NorthStar and Yodel executed an insertion order agreement changing the structure by which Yodel would be compensated.[69] NorthStar's Rule 30(b)(6) witness was asked, "Why was the decision made to enter into a new contract with Yodel at this point?" NorthStar's witness answered, "By changing the compensation structure, we were hopeful that we could make the campaign financially viable."[70]

10. NorthStar allowed Yodel to upload consumer lead data directly into NorthStar's telemarketing software which stored all of the data NorthStar used for telemarketing.[71]

11. NorthStar provided regular reports to Yodel about the sales it was making as a result of Yodel's calls.[72]

* * *

This undisputed evidence establishes that NorthStar's involvement with Yodel's material acts (acts in violation of the TCPA as alleged in count one) was

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[69] Doc. no. 120, pp. 14-15, ¶ 20; doc. no. 127, p. 11, ¶ 20.

[70] Doc. no. 120, pp. 14-15, ¶ 20, citing deposition at doc. no. 121-2, p. 181.

[71] Doc. no. 117, p. 13, ¶ 43; doc. no. 124, p. 20, ¶ 43.

[72] Doc. no. 117, p. 14, ¶ 44; doc. no. 124, p. 20, ¶ 44.

both ongoing and significant. NorthStar was involved in determining what would be said in the prerecorded messages delivered by Yodel's soundboard technology. NorthStar was involved in determining which telephone numbers would or would not be called by Yodel. NorthStar effected changes in Yodel's calling procedures, including but not limited to procedures regarding what should or should not be said in the calls, and procedures governing how leads contacted in the calls would be delivered to NorthStar. In at least one instance, Yodel corrected its procedure in response to an inquiry from NorthStar about a complaint NorthStar had received from a consumer who had been called by Yodel. Yodel acquiesced to NorthStar's instructions and to NorthStar's expectations regarding the rate of transfers. There is no dispute that NorthStar accepted leads generated by Yodel when those leads were transferred to NorthStar, and there is no dispute that NorthStar followed up on some leads generated by Yodel with call-backs.

Evidentiary materials in the summary judgment record plainly establish that NorthStar manifested its assent to have Yodel act on NorthStar's behalf, and that NorthStar controlled or had the right to control material aspects of Yodel's performance on behalf of NorthStar. Throughout the relationship, NorthStar retained the capacity to assess Yodel's performance, to provide instructions to Yodel, and to terminate the agency relationship by revoking Yodel's authority to act on NorthStar's behalf. NorthStar had significant and continuing control over the manner and means of Yodel's calling activities. NorthStar gave Yodel more than passive permission to place the calls in question. NorthStar made requests and gave instructions regarding the manner in which the calls in question would be made.

As against this evidence, defendants make several arguments. Defendants argue that Yodel was an independent contractor rather than an agent of NorthStar. But an independent contractor may be an agent, as the terms "agents" and "independent contractor" are not necessarily mutually exclusive. 1-800 Contacts,

Inc. v. Lens.com, Inc., 722 F.3d 1229, 1251 (10th Cir. 2013). The commercial world (not to mention the legal profession) abounds with independent contractor relationships that are also agency relationships.

Defendants also argue that Yodel did not have the power to bind NorthStar in a contractual relationship. One may be an agent of a principal, however, without having authority to bind the principal to a contract with a third party. *Id*. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. *Id*. Defendants also argue that they were given assurances by Yodel that the calls NorthStar hired Yodel to make were TCPA-compliant. The court takes it as an established fact that the assurances argued for by NorthStar were given. That said, erroneous assurances by Yodel regarding the reach (or lack of reach) of the TCPA[73] do not eliminate NorthStar's liability for Yodel's illegal acts as an agent.

Defendants also argue that NorthStar was not involved in all aspects of Yodel's material conduct, which is a true statement as far as it goes. For example, there is no evidence that NorthStar had anything to do with Yodel's choice of the voice talent used to prerecord the audio messages or in Yodel's selection of the call center in India to place the calls. But undisputed evidence already reviewed in this order demonstrates that NorthStar had sufficient involvement in material aspects of Yodel's conduct to establish, as a matter of law, that Yodel acted as NorthStar's agent.

Under an actual (classical) agency theory of liability, NorthStar has vicarious liability for Yodel's violations of the TCPA as alleged in count one. Accordingly,

[73] To illustrate, one email from Yodel to NorthStar erroneously stated that "The TCPA laws cover cell phones, not land lines." Doc. no. 127-24. (NorthStar's Rule 30(b)(6) witness testified that NorthStar understood the TCPA would apply to Yodel's calls made to the leads. Doc. no. 127-1, p. 91.)

Braver and the class are entitled to summary judgment against NorthStar on count one. This conclusion makes it unnecessary to consider Braver's alternative theories of agency. Nevertheless, the court will briefly address those theories as alternative grounds for the same result.

Apparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal. May 2013 FCC Ruling, 28 FCC Rcd. 6574, 6586-87, ¶ 34. Apparent authority depends on whether a reasonable person would believe that the calling party had the authority to act on behalf of NorthStar. *See,* Kristensen v. Credit Payment Services, 12 F.Supp.3d 1292, 1306 (D. Nev. 2014) ("Apparent authority depends on whether a reasonable person would believe that the sender of the text messages, or the person that caused the text messages to be sent, had authority to act on behalf of Defendants").

Defendants argue that NorthStar's communications with the class do not evince the type of expressive conduct necessary to show that Yodel had the right to act with legal consequences for NorthStar, so that there was no apparent authority. Undisputed evidence, however, shows NorthStar accepted the calls referred to it by Yodel. In doing so, NorthStar demonstrated to the called persons, by both NorthStar's conduct[74] toward the called persons, and by NorthStar's conversations[75] with the called persons, that Yodel (a/k/a the "Security Help Center") had the apparent authority to place the initial calls, triggering follow-up by NorthStar as needed. A reasonable person in the position of a called person could only conclude

[74] NorthStar accepted the transferred call or NorthStar called the person back.

[75] NorthStar tried to sell a residential security system to the persons Yodel had qualified as prospects for NorthStar.

that Yodel was acting on behalf of NorthStar, within Yodel's apparent authority to do so.

The court's conclusion regarding apparent authority is based on the court's reasoning as stated above. Some additional undisputed facts may further support that conclusion but are not necessary to it. The May 2013 FCC Ruling states that evidence that a seller allows an outside sales entity to enter consumer information into the seller's sales or customer systems may be relevant to a determination of apparent authority. May 2013 FCC Ruling, *supra* at 6592, ¶ 46. It may also be relevant that the seller reviewed the outside entity's telemarketing scripts. *Id*. These facts are established on this record.

As for ratification, a seller may be liable for the acts of another under agency principles if the seller ratifies those acts by knowingly accepting their benefits.[76] May 2013 FCC Ruling, 28 FCC Rcd. 6574, 6586-87, ¶ 34. Such ratification may occur through conduct justifiable only on the assumption that the person consents to be bound by the act's legal consequences. *Id*. at 6587, ¶ 34. Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority. Restatement (Third) of Agency §4.01. A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf. *Id*. at §4.03. Knowing acceptance of the benefit of a transaction ratifies the act of entering into the transaction; this is so even though the person also manifests dissent to becoming bound by the act's legal consequences. *Id*. at § 4.01 cmt. d. A person may ratify an act by receiving or retaining benefits the act generates

[76] Defendants argue that a principal-agent relationship is a prerequisite before ratification could potentially occur. Restatement (Third) of Agency § 4.01 cmt. b suggests this is a minority view. It states: "In most jurisdictions, ratification may create a relationship of agency when none existed between the actor and the ratifier at the time of the act." The court need not resolve this issue but notes that if an agency relationship is required for ratification to occur, that requirement is satisfied.

if the person has knowledge of material facts and no independent claim to the benefit. *Id*. at §4.01 cmt. g.

The record establishes ratification. Undisputed evidence shows that NorthStar accepted benefits generated by Yodel's calls made in violation of the TCPA. Undisputed evidence shows that during the NorthStar telemarketing campaign, Yodel made 77,912,856 calls using its soundboard system.[77] From those nearly 78 million calls, Yodel provided NorthStar with 7874 leads and between 5309 and 9196 live call transfers.[78] Most importantly, it is undisputed that Yodel's leads resulted in roughly 150 new NorthStar customers.[79] NorthStar argues that the telemarketing campaign was a "colossal failure," which the court assumes, for present purposes, to be true. But that does not change the fact that NorthStar, with knowledge of Yodel's material acts, accepted the benefits of calls placed by Yodel in violation of the TCPA.

Assuming for the sake of discussion that Braver's actual agency theory is (for some reason not apparent to the court) defective, the court quite readily concludes that Braver and the class are nevertheless entitled to summary judgment against NorthStar based on apparent authority or ratification.

Finally, although not the basis of any of the court's rulings, the court states its view that it only makes sense to hold NorthStar vicariously liable for Yodel's acts where the record conclusively shows, as it does here, that NorthStar authorized Yodel to place the calls in question. *See generally,* May 2013 FCC Ruling, 28 FCC Rcd. 6574, 6593, ¶ 47 ("[W]e see no reason that a seller should not be liable under those provisions [§ 227(b) and (c)] for calls made by a third-party telemarketer when

[77] Doc. no. 117, p. 14, ¶ 46.

[78] Doc. no. 117, p. 14, ¶ 47.

[79] Doc. no. 117, p. 14, ¶ 45.

it has authorized that telemarketer to market its goods or services. In that circumstance, the seller has the ability, through its authorization, to oversee the conduct of its telemarketers, even if that power to supervise is unexercised.")

In summary, although the court recognizes that issues concerning the existence and scope of an agency are typically for a jury, this record supports but one conclusion: an agency existed which encompassed Yodel's acts taken in violation of §227(b)(1)(B) and 47 C.F.R. §64.1200(a)(3). Accordingly, with respect to count one, Braver's motion, brought on his own behalf and on behalf of the class, will be granted against NorthStar, based on NorthStar's vicarious liability for the acts of its agent, Yodel.

As this order has already found Yodel directly liable on count one, Braver and the class are entitled to summary judgment against both defendants on count one.

VI. Count Three

Defendants move for summary judgment on count three, which alleges that defendants violated 47 C.F.R. §64.1200(d) by failing to provide identifying information during telemarketing calls, and by initiating calls without having first implemented an effective written policy meeting required minimum standards. Defendants argue that although the complaint alleges 47 C.F.R. §64.1200(d) was promulgated under 42 U.S.C. §227(c) (a subsection of the TCPA which provides a private cause of action), §64.1200(d) was actually promulgated under § 227(d), a subsection of the TCPA which does not provide a private cause of action.

Burdge v. Association Health Care Management, Inc., 2011 WL 379159 (S.D. Ohio Feb. 2, 2011), found that § 64.1200(d)(4) is technical and procedural in nature and was promulgated pursuant to § 227(d) of the TCPA, as NorthStar and Yodel contend. *Id*. at *4. Like the claims involved in the current action, Burdge included claims that the caller had not given the required identifying information. Burdge noted that § 227(d) provides: "The Commission shall prescribe technical and

procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone," and "[s]uch standards shall require that…all artificial or prerecorded telephone messages shall" include certain identifying information about the identity of the business or entity initiating the call. *Id*. at *3. Burdge concluded that § 64.1200(d)(4), which addresses these same matters, was promulgated under § 227(d), a section which does not provide a private cause of action; accordingly, Burdge dismissed certain claims. *Id*. at *4. *And see,* Worsham v. Travel Options, Inc., 2016 WL 4592373, *7 (D. Md. Sept. 1, 2016) (finding Burdge "persuasive").

Braver relies on Charvat v. NMP, LLC, 656 F.3d 440, 448 (6th Cir. 2011), for his contention that § 64.1200(d) was promulgated under §227(c) rather than §227(d). While Charvat states as much, it does so without analysis. Furthermore, § 227(c) pertains to the protection of subscriber privacy rights and only provides a cause of action to a person aggrieved "under this subsection." 47 U.S.C. §227(c)(5).

The court declines to rely on Charvat's statement that §64.1200(d) was promulgated pursuant to §227(c) and agrees, instead, with Burdge, Worsham and other decisions that have concluded § 64.1200(d) was promulgated under §227(d). There is no private right of action for alleged violations of §64.1200(d), and defendants are therefore entitled to summary judgment in their favor on count three.

VII. Conclusion

Yodel's motion (doc. no. 123) to join NorthStar's motion for summary judgment is construed as a motion seeking leave to join in all of NorthStar's moving papers currently before the court, including NorthStar's motion for summary judgment, NorthStar's reply brief, and NorthStar's brief filed in response to plaintiff's motion for summary judgment. So construed, the motion is **GRANTED**.

Each of the cross-motions for summary judgment is **GRANTED IN PART** and **DENIED IN PART**, as follows.

Braver's motion for summary judgment (doc. no. 117), brought on Braver's behalf and on behalf of the class, is **GRANTED** on count one. Yodel has direct liability for its actions in violation of 47 U.S.C. §227(b)(1)(B) and 47 C.F.R. §64.1200(a)(3), and NorthStar has vicarious liability for Yodel's actions in violation of that statute and regulation. Braver and the class are therefore granted summary judgment in their favor, against NorthStar and Yodel, on count one. In all other respects Braver's motion for summary judgment is **DENIED**.

NorthStar's motion for summary judgment (doc. no. 120), joined in by Yodel, is **GRANTED** on count three. There is no private right of action for violations of 47 C.F.R. § 64.1200(d). Accordingly, NorthStar and Yodel are entitled to summary judgment in their favor, against Braver, on the claim alleged by Braver in count three. *See*, n. 1, *supra*. In all other respects defendants' motion for summary judgment is **DENIED**.

The court desires to bring this case to a conclusion without undue delay. This case is **SET** for a status conference in chambers (to be attended by lead counsel for all parties) on August 13, 2019 at 8:30 a.m. The purposes of the status conference will include planning for a standardized claims process. To that end, the parties are **DIRECTED** to promptly confer with a view to agreeing on a claims process (at least in broad outline). A notice describing any such agreement shall be filed not later than noon on August 12, 2019. If the parties are unable to agree on a claims process, they shall file their respective proposals not later than noon on August 12, 2019.

IT IS SO ORDERED this 16th day of July, 2019.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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EXHIBIT 2

Home Security Script

(Main)

1. **Intro:** Hello this is Billy, I am a security advisor on a recorded line, can you hear me okay?
    a. Intro Joe: Hello this is Joe, I am with the department of Home Security for your neighborhood on a recorded line, how are you today?
    b. Intro Billy: Hello this is Billy, I am a 3rd party advisor with the local department of home security on a recorded line, can you hear me okay?
2. **Short Intro:** Hello this is Billy with the security help center on a recorded line, can you hear me okay?
    a. Short Intro Joe: Hello this is Joe with the security help center on a recorded line. Can you hear me okay?
    b. Short Intro Billy: Hello this is Billy with the security help center on a recorded line. Can you hear me okay?
3. **Purpose:** Okay, good, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood, have you been informed about that?
4. **Security Concern:** With crime rates and mass shooting on the rise in the US and national security with our borders, you can see having false alarms with home security systems in your area can be a big concern, right?
5. **My job:** So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for. Are you the homeowner?
    a. **No**: Are you renting? (DNQ if renting)
    b. **No:** I am not renting: Okay, I will hold while you bring the homeowner on the line, okay?

(Form)

6. **Citizen:** Are you a US Citizen? If NO: then DNQ
7. **Mobile or Trailer:** Ok, and is your home a Mobile home or Trailer?
    a. Yes (DNQ)
    b. No (move to Square Footage)
8. **Square Footage:** Does your home have at least 2 bedrooms? (**If No: DNQ)**
9. **Name**: Can I get your first and last name.
10. **Qualify:** Okay, it looks like this is all the information I need to see if I can qualify you. Let's see here (Keyboard typing).....Oh yes, it does look like you do qualify to speak with one of our security specialists about how to make your home more secure. Based on the information you have given me, you seem like a person who is concerned about your security within your home. Do you feel like you can benefit from some new information on how to make your home more secure?
    a. **(IF NO: DNQ)**
11. **Almost Forgot:** Oh, and I almost forgot, one last question, do you currently have a home security system?

(Close)

12. **Security Specialist:** I'm going to schedule a time for a security specialist to give you a call back to discuss the details; now what's the best time? Morning, afternoon, or evening?
13. **Security Specialist Transfer:** Now before we finish up, I want to check one last thing. I want to see if we have any specialists available now for you to speak with, one second… Okay, yeah. This is good. We do actually have someone that covers your area that we can connect you with right now. Hang on while I bring one of them on the line…
14. **Warm Handoff:** Hi, I have a qualified candidate on the line I need you to help.
15. **Finish transfer:** Thank you for taking the time with me today, you're in good hands now and you both have a great day.

Alternative Interactive Responses

Banters

Yes

No

That’s okay

Okay, got it

Uh huh

Okay

Not an issue

Oh, I agree

Yeah

Ha ha
That’s fine

Thank you

Perfect

Sorry

No problem

Absolutely

Great

I am so sorry to hear that

Let’s see if we can help you with that.

Gotcha

That is too bad

Darn

Exactly

I understand

Oh my goodness

Excellent

Well that's exciting

You know, I'm glad to hear that

Wow, that's awesome

Miscellaneous

DNQ square foot- I am sorry, your home does need to have at least 2 bedrooms to qualify, thanks for your time, you have a great day.

Renting- So are you renting?

Wait HomeOwner- I'll wait while you bring the homeowner on the line, ok?

Not Waiting- Okay, we will have someone call you back at a later date, thanks for your time.

Wrong Number- Oh ok, I just show that someone from your household was looking to increase the security of your home. Are you wanting to update or upgrade the security of your home?

RPT Purpose- What I was saying is, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with home security systems in your neighborhood, have you been informed about that?

DNQ HomeOwner- We do need you to be a homeowner to qualify for this program but thank you and have a great day.

Own your home- Now do your own your home?

Can you repeat that?- I'm sorry, I didn't catch that, can you please repeat that?

I'm sorry what was that?- I'm sorry, what was that?

I'm sorry, I don't have that- I'm sorry, I don't have that information...I apologize.

My Name is - My name is Billy.

My Name is- My name is Joe.

I am with: I am with the security help center.

Let me check- Let me check.

No, I don't think- No, I don't think so.

We can help you - Yes, absolutely, we can help you with that.

Sorry you cut out- I'm sorry, it sounded like you cut out there. What was that again?

Thank you- Thank you

Disconnected- Hello? Yeah, are you there? We must have gotten disconnected. Sorry about that. Let's see….where were we here?

Can I speak with- Oh, yea, that sounds fine. Go ahead and put them on the phone and I'll speak with them.

What's their info- Okay, and what is their name and phone number?

Is Human- Ha ha….You know, I've never had that question before. I do have to follow a strict script and ,uh, I guess I sound kind of strange sometimes!

Are you still there- Uh, hello, are you still there?

Cut out- Oh, you cut out for just a second there. What was that?

Oh, just taking notes- Oh, yea, sorry..I'm still here. I was just taking some notes while you were speaking.

Yes, I am- Yes, I'm still here.

Not much longer- Uh, yea..no..we're not going to be much longer.

Just a second- Um, just a second, please.

Glad to hear that- You know, I'm glad to hear that.

Confirm- Oh, I just need to confirm, that's all.

Emergency- You know I don't know that off the top of my head. If you remember that I think I can get someone to help answer that in a moment
No

Rebuttals

Citizen/credit- Well, we ask about citizenship to know if you have had the opportunity to establish a credit foundation, So how is your credit good bad or average?

Who are you calling for- You know I don't have the specific information here in front of me, it's just my job to make sure all the homes in your neighborhood are aware of the technologies and security programs available in your area?

Name rebuttal- Well we need to gather your basic information, such as your first and last name so we can get you qualified for a free security system. So now what is your first and last name?

Not sure 1000 sq ft- Well, does your home have at least 2 bedrooms, if so, it's at least a thousand square feet. So does your home have at least 2 bedrooms?

No Money/Can't Afford
I understand, a lot of people I talk to actually think that this is too good to be true, but we really do give you a $850 dollar home security system for free. Now, all I'm asking for is couple minutes of your time to find out more about it, then you can decide for yourself if its good fit for you and your family. Okay?

No TIme-You know with the economy like it is people are doing things that they normally wouldn't do, so the crime rate is continuing to go up. I can simply get you over to a specialist, if you don't like what you hear then we can shake hands and part as friends. Okay?

Is this a Scam?
(Laugh), I actually get that a lot, this is a legitimate offer we're actually looking for a model home in your area and word of mouth is how we grow our company but before you decide anything, I just want to finish up here and get you over to a security specialist and they will give you all the details so you can decide for yourself if it's a good fit, okay?

I Have Protection
That's great you have the things to protect your home but the nice thing about the security system is that it protects your home whether there or not, also a security system protects you against fire and other medical emergencies as well.

Cost?
This offer includes hundreds of dollars worth of equipment at no charge to you and our specialist will explain any of the costs related to this offer, okay?

Protect by Area?
Yes, the monitoring actually varies by area, I just need to verify that you do own the home you're living in and then I'll get you right over to the specialist who can answer all of your questions, do you own the home you're living in?

Not Interested- I understand, What I can do for you so you don't miss out on this limited time offer is transfer you over to a specialist to explain the details to you, then you can decide for yourself if it's a good fit for you and your family, is that okay?

More Information
I can understand wanting to get all the details before you make a decision. That's why I'm going to transfer you over to our specialist to answer all of your questions. Does that sound fair?

Is that a YES
Sorry, Is that a Yes?

Go Ahead
Go ahead

Fee/Cost
Monthly monitoring costs will be covered by the home security analyst but they are less than a cup of coffee a day, let me just make sure you qualify and I will get them on the line okay?

Spouse Speak to
I can understand that, let's do this, let me just make sure you meet the basic requirements so we can get you over to a specialist to make an appointment to talk to you and your significant other.

Few Questions
I just have a few questions and then I'll transfer you to the specialist, okay?

Where are you call
I'm calling from Palm Harbor Florida

Where get my info
Sorry I don't have exactly where your information came from I just have a message here that says there have been some false alarms with home security systems, in your Neighborhood and that is important to contact all the homeowners in your surrounding area, so now are you the homeowner?

Hold Queues

Sports- So do you follow any sports there where you are?

I enjoy- I enjoy the history channel and crime shows.

That's great- oh well that's great.

What team- So what teams are your favorites?

Sorry for delay- I'm sorry for the delay, it looks like all our financial experts are tied up right now, but I did just get a message stating that it's not going to be very much longer. So hang on just one more second please.

No TV for me I've always told myself I need to cut back on how much tv I watch, but I never know what to do, so how do you occupy your time?

Outside Wow that's great, it is good to stay active, I'm really impressed!

My team- I grew up in Alabama, so I'm obviously an Alabama fan!

Favorite Shows So do you have any favorite shows you've been watching?

What are your hobbies And do you have any hobbies, what do you like to do in your spare time?

How many- That's great how many do you have?

Have not seen You I have not seen that one but it sounds interesting though.

Inhouse Oh that's neat how did you learn how to do that?

Weather-So, how's the weather where you are?

Weather response- Well I can't complain really, the weather here in FL is beautiful almost year around.

That's wonderful- Oh that's so wonderful.

Little Longer-
It's just going to be a second or so longer.

DNC

DNC Added-

Okay, your name has been added to our Do Not Call list. Thank you for your time.

DNC Complaint-

I am so sorry. I hate it when people are upset because they have received too many calls. I will put you on our Do Not Call Registry right away. Sorry for the inconvenience. Please have a wonderful day.

DNC Complaint Manager-
Okay, well I'm really glad I took this call because I am a manager here and I apologize for any inconvenience at all. I can assure you that you have been placed on our Do Not Call Registery and you will not be called again. So you have a wonderful day.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT H. BRAVER, for himself and all individuals similarly situated, Plaintiff, -vs- NORTHSTAR ALARM SERVICES, LLC, a Company, et al., Defendants.	)	Case No. CIV-17-0383 -F

ORDER CERTIFYING CLASS, INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the court is plaintiff Robert H. Braver's motion for class certification of the claim alleged in count one of the first amended complaint.[1] Doc. no. 42. Count one alleges that defendants' robocalls delivered a prerecorded telemarketing message without plaintiff's or the class members' prior express written consent, in violation of the Telephone Consumer Protection Act (TCPA, or the Act), 47 U.S.C. §227(b), and 47 C.F.R. § 64.1200(a)(3).

An evidentiary hearing was held on the motion on June 8, 2018. At the conclusion of the hearing the court requested supplemental briefing along with

[1] The first amended complaint was deemed further amended by the court (see doc. no. 54) after the parties stipulated to the dismissal of count two. Accordingly, count two is no longer alleged. Class certification has not been sought with respect to count three.

proposed findings of fact and conclusions of law. The briefing is complete, and the motion is ready for determination.[2]

Part I, the introduction to this order, reviews some of the general allegations, sets out the statute and regulation upon which count one depends, and describes the class and sub-class proposed by the plaintiff. Part II states the court's findings of fact. Part III states the court's conclusions of law. When it serves readability to do so, some fact-findings have been included in the conclusions of law portion of this order. To the extent that any matters have been characterized as conclusions of law when they are more accurately characterized as findings of fact, they should be so regarded. The court's findings and conclusions support certification of the proposed classes, which are described in Part IV. The schedule, going forward, is addressed in Part V.

I. Introduction

A. General Allegations

Plaintiff Robert H. Braver, individually and on behalf of all others similarly situated, brings claims against defendants, Northstar Alarm Services, LLC ("Northstar") and Yodel Technologies, LLC ("Yodel"), seeking to recover statutory damages based on defendants' alleged violations of the TCPA.

The first amended complaint alleges that Northstar hired Yodel to initiate telemarketing calls advertising Northstar's home security systems. Doc. no. 7, ¶ 2. Plaintiff alleges that Yodel initiated thousands of calls marketing Northstar's home security systems to residential telephone numbers using a prerecorded voice without express written consent, including calls to plaintiff's home telephone number, in

[2] The briefing includes the motion (doc. no. 42); NorthStar's response brief (doc. no. 57); Yodel Technologies' response brief (doc. no. 59); Braver's reply brief (doc. no. 62); Braver's supplemental brief (doc. no. 69); and Northstar's supplemental brief (doc. no. 71). The hearing transcript is at doc. no. 67.

violation of the TCPA, 47 U.S.C. § 227(b)(1)(B). *Id.* at ¶¶ 2, 3, 18, 22, 34. Plaintiff alleges that the defendants concealed their identities by spoofing phone numbers on caller IDs and using fictitious business names until consumers expressed enough interest in Northstar's goods and services to be transferred to a live representative. *Id.* at ¶¶ 19, 20, 21, 23, 24, 25, 26. Plaintiff alleges that Northstar is vicariously liable for Yodel's conduct. *Id*. at ¶¶ 36-42. [3] Plaintiff and class members seek statutory penalties from $500 to $1500 per violation for defendants' willful violation of the TCPA. *Id.* at ¶¶ 60-62.

B. The Statute and the Regulation Upon Which Count One Depend

Title 47 U.S.C. § 227(b)(1)(B) makes it unlawful "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party."

Federal Communications Commission regulations promulgated under the TCPA include 47 C.F.R. § 64.1200, addressing delivery restrictions on telephone calls including "telemarketing" calls.[4] Subsection (a)(3) of § 64.1200 requires that consent for "telemarketing" calls must be "prior express written consent."[5]

The term "prior express written consent" is defined in the regulation as follows.

> [A]n agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice,

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[3] The court previously dismissed any direct liability claims alleged against NorthStar, after plaintiff confessed that issue. Doc. no. 27, p. 7.

[4] "The term "telemarketing" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(12).

[5] The regulation states that except in situations not material here, "No person or entity may…[i]nitiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party…." 47 C.F.R. § 64.1200(a)(3).

> and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.
>
> (i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
>
> (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.
>
> (C) The term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.
>
> 47 C.F.R. § 64.1200(f)(8).

C. Class and Subclass Requested for Certification

The motion seeks certification of a national class and sub-class pursuant to Fed.R.Civ.P. 23(a) and (b)(3), defined as follows.

> Class:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 20[6] or 50[7] to the call, and that resulted in the normal clearing disposition.[8]

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[6] Status Code 20 means that the called party responded to the prerecorded prompts by stating that they did not want to be called again. Doc. no. 42-11, pp. 32-33.

[7] Status Code 50 means that the soundboard agent played at least six prerecorded message prompts during the call, *i.e.* up to the prerecorded question "Are you a U.S. citizen?" Doc. no. 42-11, pp. 34-35.

[8] "Normal clearing" indicates successful call completion to the called party. Doc. no. 42-4, p. 63.

Subclass:

All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 50 to the call, and that resulted in the normal clearing disposition.

Excluded from the class are:

Any persons whose contact information is associated with either an IP address or website URL in the Red Dot Data marketing list.[9]

II. Findings of Fact

Northstar is in the business of providing security and home automation systems to home owners across most of the country. Doc. no. 69-1 at 23:9-11.[10]

In January of 2016, Northstar hired Yodel to place "soundboard" or "avatar" telemarketing calls on its behalf in order to sell home security systems. Doc. no. 42-3 at 31:7-10, 67:2-24; 42-4 at 16:617, 53:2-23, 55:6-17; doc. no. 42-5 at 98:18-24.

During these calls, "soundboard agents" played prerecorded audio files, in a scripted sequence, to the recipient. Doc. no. 42-5 at 97:14 – 98:1. The standard script (with each numbered paragraph representing a separate prerecorded audio file) begins as follows.

1. Intro: Hello this is Amy,[11] I am security advisor, can you hear me okay?
2. Purpose: Okay, good, I am with the security help center and the reason why I am calling today is that there have been issues with false alarms, with

[9] Because a few of the Red Dot Data records display an IP address or URL of a marketing website which one of the leads (sales leads, *i.e.* persons called) might have visited, and which might have displayed terms and conditions requiring consent to telemarketing calls, the proposed class definition excludes persons whose contact information, as shown in the records, is associated with either an IP address or a website URL, in an effort to preempt consent arguments.

[10] Depositions transcripts are cited by page number. Except when citing deposition transcripts, this order cites ecf page numbers.

[11] During the class period, the name and voice in the recordings changed but otherwise the script remained largely unchanged.

home security systems in your neighborhood, have you been informed about that?

3. Security Concern: With crime rates and mass shooting on the rise in the US and national security with our borders, you can see having false alarms with home security systems in your area can be a big concern right?

4. My job: So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area, I just have a couple of questions to see what your home will qualify for. Are you the homeowner? . . .

Doc. no. 42-1.

These calls were placed to persons with whom the defendants had no prior relationship. Doc. no. 42-4 at 18:8-19:6. Defendants purchased the class members' telephone numbers from a data vendor, Red Dot Data, which sells the landline telephone numbers, names, and addresses of homeowners across the country. *Id.* at 18:2-19:6, 24:24-25:12.

Prior to initiating the telemarketing campaign, defendants understood that these persons had not consented to receive prerecorded calls, but purportedly believed that they did not need consent to call landline telephone numbers. *Id.* at 25:20-26:12.

The soundboard dialing system caused an invalid telephone number, which began with the same area code as the telephone number dialed, to display on the recipient's caller ID. Doc. no. 42-2 at ¶¶ 36- 44; doc. no. 42- 5 at 87:9-19.

Plaintiff received two of these calls on August 26, 2018. Doc. no. 42-13 ¶¶3-5; doc. no. 42-14.

The soundboard dialing system generated records of these calls. Doc. no. 42-4 at 57:358:6; doc. no. 42-22. The call records identify, among other things, the number dialed, the number displayed on the caller ID, the date and time of the call,

the duration of the call,[12] the telephone network's disposition of the call, and the soundboard agents' treatment of the call via "status codes." Doc. no. 42-2 at p. 9, ¶ 27; doc. no. 42-4 at 59:1-19, 61:8-9, 62:15-20, 63:10-19, 66:22-67:16, 68:15 – 69:7, 69:17-70:9; doc. no. 42-5 at 83:6-10.

As previously stated, the proposed class is limited to calls resulting in status codes 20 or 50. Status code 20 means that the called party responded to the prerecorded prompts by stating that they did not want to be called again. Status code 50 means that the soundboard agent played at least six prerecorded prompts during the call. *See*, doc. no. 42-11 at 26:10-27:19, 32:25-33:2, 34:2-35:15.

Each one of these call records corresponds to a lead in the Red Dot Data marketing list. Doc. no. 42-22; doc. 42-4 at 59:1-19.

Plaintiff's expert, Robert Biggerstaff, analyzed the call records and marketing list and identified 239,630 persons (leads), and 252,765 calls to those persons, which fall within the parameters of the class definition. Doc. no. 42-2 at pp. 9-10 ¶¶ 32-33; doc. no. 67, TR at 89:1 – 90:14. He found that 47,398 persons (leads), and 54,204 calls to those persons, fall within the parameters of the sub-class definition. Doc. no. 42-2 at p. 10 ¶ 33.

III. Conclusions of Law

A. Personal Jurisdiction

Defendants argue that the court lacks personal jurisdiction over the defendants, relying on Bristol-Myers Squibb Co. v. Superior Court of California,

[12] Yodel's Rule 30(b)(6) witness testified at his deposition that it typically takes about 5 to 6 seconds after connection before the soundboard agent plays the first prerecorded prompt in the script. Doc. no. 42-11 at 71:9-19.

___ U.S. ___, 137 S. Ct. 1773 (June 19, 2017). The court disagrees for the reasons stated below.

Defendants have waived this argument by (1) failing to raise it in either their answers or motions to dismiss, and (2) admitting personal jurisdiction in the joint status report filed with the court.[13] Defects in the district court's personal jurisdiction over a party are waived unless timely raised in a pre-answer motion or in the answer. Williams v. Life Sav. & Loan, 802 F.2d 1200, 1202 (10th Cir. 1986), citing Fed. R. Civ. P. 12(h)(1). *And see*, Sobol v. Imprimis Pharmaceuticals, 2018 WL 2424009, **2-3 (E.D. Mich. May 29, 2018) (rejecting argument that Bristol-Myers was an intervening change in the law which permitted defendants to raise the personal jurisdiction issue for the first time after failing to raise it in their answer).

In addition, defendants' reliance on Bristol-Myers is misplaced. This court joins the majority of other courts in holding that Bristol-Myers does not apply to class actions in federal court. *See, e.g.*, Casso's Wellness Store & Gym, LLC v. Spectrum Lab. Prods., Inc., 2018 WL 1377608, at *5 (E.D. La. Mar. 19, 2018) (TCPA case; noting "the lack of federalism concerns in federal court" in TCPA class action); Sanchez v. Launch Tech. Workforce Solutions, LLC, 297 F. Supp. 3d 1360, 1367 (N.D. Ga. Feb. 14, 2018) (rejecting attempt to extend Bristol-Myers to federal court FCRA action, noting federalism concerns did not apply); In re Chinese-Manufactured Drywall Prod. Liability Litigation, 2017 WL 5971622, at *16 (E.D. La. Nov. 30, 2017) ("BMS does not speak to or alter class action jurisprudence."); Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc., 2017 WL 4224723, at *5 (N.D. Calif. September 22, 2017) (not extending Bristol-Myers to class actions, noting Bristol-Meyers was a mass tort action not a class action); Molock v. Whole Foods

[13] The joint status report, filed October 2, 2017 (after Bristol-Myers was decided), states: "The parties stipulate that the Court has personal jurisdiction over the parties." Doc. no. 31 at p. 2.

Market, Inc., 297 F. Supp. 3d 114, 126 (D. D.C. 2018) ("Bristol-Myers does not apply to class actions.").

B. Standards For Determining Certification

Plaintiff, as the party seeking class certification, has the burden of proof on all prerequisites to certification. Anderson Living Trust v. WPX Energy Production, LLC, 306 F.R.D. 312, 376 (10th Cir. 2015), citing authorities. Plaintiff has a strict burden to show that every aspect of Rule 23 is clearly met. Trevizo v. Adams, 455 F.3d 1155, 1162 (10th Cir. 2006); *and* s*ee*, General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160 (1982) ("[A]ctual, not presumed, conformance with Rule 23(a) remains…indispensable.").

The first inquiry is whether the plaintiff can show the existence of the four threshold requirements of Rule 23(a). *Id.* The four requirements are: 1) numerosity, 2) commonality, 3) typicality, and 4) adequacy of the representative party. The district court must engage in its own "rigorous analysis" to decide whether these requirements are met. CGC Holding Co., LLC v. Broad and Cassel, 773 F.3d 1076, 1085 (10th Cir. 2014) (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)).

If the court determines that the four prerequisites of Rule 23(a) are satisfied, "'it must then examine whether the action falls within one of the three categories of suits set forth in Rule 23(b)." Shook v. El Paso County, 386 F.3d 963, 971 (10th Cir. 2004), quoting Adamson v. Bowen, 855 F.2d 668, 675 (10th Cir. 1988). Here, plaintiff seeks certification of a class under the third of these categories, per Rule 23(b)(3). Before a class action can be certified under Rule 23(b)(3), it is necessary for the court to find that: 1) "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that 2) a class action is "superior to other available methods for the fair and efficient

adjudication of the controversy." Fed.R.Civ.P. 23(b)(3); Monreal v. Potter, 367 F.3d 1224, 1236-37 (10th Cir.2004).

"[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising [plaintiffs'] cause of action.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978), quoting Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558 (1963). The court's view of the merits – assuming that there is some basis for guessing at the merits at the class certification stage – should not influence the decision on class certification. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974). Nevertheless, the required rigorous analysis will frequently "entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, (2011).

Finally, whether to grant or deny certification of a class action under Rule 23 lies within the broad discretion of the district court. Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir.1988). The decision necessarily entails weighing the practical and prudential considerations raised by the facts unique to each case. *Id.* at 1309-1310.

C. Fed.R.Civ.P. 23(a) Requirements

1. Rule 23(a)(1) – Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." Although there is no magic number of members which would require class certification, classes of more than forty members have been deemed to satisfy the numerosity requirement. *See*, *e.g.*, Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 275-76 (10th Cir.1977) (class of 41 at time of filing, or 46 at time of trial, sufficient to warrant class certification). In evaluating numerosity, the court may also consider whether the proposed class members are geographically dispersed. Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir.1981).

In this case, the proposed class and subclass contain, respectively, 239,630 and 47,398 persons residing throughout the United States. *See*, motion, doc. no. 42 at p. 18; and doc. no. 42-2 at pp. 10-11, ¶¶ 32-33. Joinder of 239,630 and 47,398 class members residing throughout the United States would be impracticable. The numerosity requirement is satisfied -- a point which defendants, in any event, concede. Doc. no. 57, p. 15.

2. Rule 23(a)(2) – Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." This is a low hurdle. Williams v. Mohawk Indus., Inc., 568 F.3d 1350, 1356 (11th Cir. 2009). Commonality requires only a single issue common to the class. J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1288 (10th Cir.1999). The class claims must "depend upon a common contention … capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

A core allegation with respect to count one is that calls using a prerecorded voice, in this case soundboard audio files, were placed to the proposed class members' residential telephone lines in an effort to market Northstar's home alarm systems. The technology in issue, called avatar or soundboard technology, involves humans who are purportedly listening in and who attempt to press computer buttons to generate a prerecorded response or a conversation which would be consistent with whatever the called party might have said. Doc. no. 67, TR at pp. 46-47.

Core allegations require determination of a number of common questions of fact and law, including: (1) whether the soundboard/avatar files used in the calls qualify as a "prerecorded voice" prohibited by the TCPA; (2) whether the calls constitute "telemarketing" under the FCC's rules; and (3) whether Northstar is liable for calls placed on its behalf through Yodel's system.

Defendants argue that factual variations in the calls raise individualized issues which prevent a finding of commonality. The court rejects that argument. Based on the evidence heard to date, it appears that all of the calls at issue delivered a prerecorded soundboard message. *See* doc. 67, TR at 84:14 – 91:2 (numerous measures taken to ensure that only calls which delivered a prerecorded soundboard message are included in the class). Whether the use of this technology violates the TCPA is common question for all of the calls in the proposed class. *See*, Margulis v. Eagle Health Advisors, LLC, 2016 WL 1258640 (E.D. Mo. 2016) (describing use of avatar technology and holding that these facts state a claim for relief under the TCPA).

Defendants also argue that common proof cannot show that all of the calls were to residential lines. Defendant argues, for example, that some of the numbers, including plaintiff's, may have been used for business purposes. Defendant has shown, for example, that plaintiff's number was included in the "Business Listing" section of an index of numbers complied by the Norman Chamber of Commerce. Doc. nos. 57-4, 57-5.[14]

The TCPA does not make an exception to its prohibition for calling telephone lines if the residential line is used for a home-based business or for another business purpose. Under other sections of the Act related to residential lines, such an exception has been rejected by the Federal Communications Commission. *See*, Rules and Regulations Implementing the TCPA, 70 FR 19330, 19331 (2005) ("We also decline to exempt from the do-not-call rules those calls made to 'home-based businesses….' "). Explicit Congressional findings accompanying the substantive

[14] The listings in question with respect to Braver, state "INDIVIDUALS" at the end of the listing. Doc. no. 57-4, p. 7, 11, 13; doc. no. 57-5, p. 2; doc. no. 57-6, p. 2. In addition, Braver testified that the phone number in question had been his residential phone number since his early teen years. Doc. no. 62-2, p. 91.

provisions of the TCPA itself state: "Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Public Law 102-243, § 2(12), 105 Stat. 2394 (1991) (note to 47 U.S.C. § 227).

The majority of courts to have considered this issue have concluded that factual questions related to personal use, as opposed to commercial use, do not prevent certification of consumer protection class actions. Yazzie v. Gurley Motor Co., 2015 WL 10818834, *5 (D. N. Mex. 2015). Moreover, if issues need to be tried to determine whether a line is a business line or a residential line, those issues could be resolved by asking class members whether the line in question is a residential line during the class notification process, or, in any event, through a standardized and efficient claims process at a later stage. *See*, *e.g.*, *id*. (issues regarding the consumer nature of the transaction could be resolved simply by asking class members about their vehicle use during class notification process).

There are questions of law or fact which are common to all members of the proposed class. The commonality requirement is satisfied.

3. Rule 23(a)(3) -- Typicality

Rule 23(a)(3) requires that the claims of the representative party be "typical of the claims ... of the class." The purpose of the typicality requirement is to assure that the interest of the named class representative aligns with the interests of the class. Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.1992). Typicality refers to the nature of the claim of the class representative and not to the specific facts from which it arose or to the relief sought. *Id.* Factual differences will not render a claim atypical if the claim is based on the same legal or remedial theory and arises from the same events or course of conduct as do the claims of the class.

Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988); Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 189 (D.Kan.1991) (typicality ensures the class representative's claims resemble the class's claims to an extent that adequate representation can be expected; an important part of typicality is the inquiry into whether the representative's interests or claims are antagonistic or adverse to those of the class); A Aventura Chiropractic Center v. Med Waste Management, 2013 WL 3463489, *4 (S.D. Fla. 2013) ("A Aventura satisfies typicality as the course of conduct that produced its TCPA claim also produced the claims of the proposed class.")

Defendants argue that Braver's claim is not typical because his number was published by the Norman Chamber of Commerce. That argument is specious. The evidence shows quite clearly that defendants wanted to call residential telephone numbers and obtained Braver's number not from the Norman Chamber of Commerce but from Red Dot Data. The fact that Braver's number is included in a publication by the Norman Chamber of Commerce does not defeat typicality.

Braver's claim and the class members' claims arise from the same operative allegation: that without express written consent, a call was initiated, using a prerecorded voice, to Braver's and the class members' residential telephone lines, in an effort to market Northstar's home security systems, in violation of the TCPA. Braver's claim is typical of the class member's claims. The typicality requirement is satisfied.

4. Rule 23(a)(4) -- Adequacy

Rule 23(a)(4) requires that the representative party must "fairly and adequately protect the interests of the class." With regard to the adequacy requirement, two questions must be resolved: (1) do the named plaintiff and his counsel have any conflicts of interest with other class members? and (2) will the named plaintiff and his counsel prosecute the action vigorously on behalf of the

class? Rutter &Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1187-1188 (10th Cir.2002). Thus, adequacy factors in potential conflicts of class counsel, and competency of class counsel. *Id.*, citing Amchem Prods, Inc. v. Windsor, 521 U.S. 591, 626, n.20 (1997).

No conflicts of interests have been identified and none are apparent here. Defendants do not dispute the competence of the proposed class counsel, and counsel are experienced litigators in civil cases, including in class actions. Braver's own experience in litigating TCPA matters and his knowledge of the TCPA speak to his ability to vigorously advocate on behalf of the class. His understanding of many of the technical aspects of this case, as was plainly evident at the hearing, is impressive. Furthermore, like every other class member, plaintiff has a claim for statutory damages and injunctive relief under the TCPA. *See*, 47 U.S.C. § 227(b)(3) (providing "$500 in damages for each such violation," injunctive relief, or both). These common interests support plaintiff's adequacy in this case.[15]

Defendants speculate that members of the class may not wish to pursue injunctive relief under the TCPA and would have a conflict with Braver, who stated in his deposition that injunctive relief was "not negotiable." This speculation does not create a conflict of interest or render Braver an inadequate class representative. An alleged conflict must be more than merely speculative or hypothetical; there must be a showing that the conflict is a real probability. *See*, *e.g.*, Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 899 (S.D.N.Y.1975) (class action determination would not be denied absent a showing that the alleged potential conflicts were real

[15] There is a relationship between typicality and adequacy requirements. *See*, *e.g.*, Meyers v. Southwestern Bell Telephone Co., 181 F.R.D. 499, 501 (W.D. Okla. 1997) (typicality and adequacy are interrelated; if the representative claims are not typical of the class, they cannot adequately protect the interests of the absent class members).

probabilities and not "mere imaginative speculation"). Furthermore, the election of statutory damages and injunctive relief as remedies by Braver would benefit the members of the class. The interests of Braver align with the interests of the class; their interests are not antagonistic to each other.

Defendants argue that Braver is inadequate because he "will place his own interests above the class's and even abandon class claims altogether, if it suits his purposes." The evidence indicates otherwise. For example, defendants offered Braver a substantial sum of money to dismiss his claims in this case and abandon the class, which he rejected. Doc. no. 67, TR at 36. The court concludes that Braver can be relied upon to see to it that the interests of the class come first and that, for instance, if the case is to be settled, it is settled on a basis that provides substantial relief to his fellow class members (commensurate with the merits as they may appear at that juncture), rather than a pittance for the class members and a windfall for class counsel.

Defendants also argue that Braver has made a business of pursuing TCPA claims and has made money pursuing claims and lawsuits. Defendants argue that Braver chose to have his number removed from the national do not call registry years ago, so that Braver "chooses to receive telemarketing calls." Doc. no. 57, p. 11. The fact that Braver has previously pursued TCPA claims and lawsuits is not disqualifying. If defendants' argument regarding the do not call registry is intended to suggest that Braver consented to the calls so that he is disqualified, the court rejects that argument; taking one's name off the national do not call registry is not the same thing as consent.

Braver is a fair and adequate representative for the proposed class. The adequacy requirement of Rule 23(a)(4) is satisfied.

D. Fed.R.Civ.P. 23(b)(3) Requirements

1. Predominance

The predominance requirement is similar to but far more demanding than the commonality requirement of Rule 23(a). Amchem Products, 521 U.S. 591, 623-24. While commonality requires the presence of common questions of law and fact, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed.R.Civ.P. 23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Products, 521 U. S. 591, 623. In other words, the inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." Tyson Foods, Inc. v. Bouaphakeo, ___ U.S. ___, 136 S. Ct. 1036, 1045 (2016). "When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id.* For the predominance requirement to be met, plaintiff's claims must stem from a "common nucleus of operative facts" and not have "material variations in elements." *See*, Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968); Edgington v. R. G. Dickinson and Co., 139 F.R.D. 183, 191 (D. Kan. 1991).

The elements of the TCPA claim in issue here are the initiation of (1) telemarketing calls (2) to any residential telephone line (3) using an artificial or prerecorded voice to deliver a message. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. §64.1200(a)(3). Class-wide evidence will determine each of these elements. For example, common evidence will show the purpose of the calls; a common legal question will be whether the purpose of the calls qualifies as telemarketing. *See*, 47

C.F.R. § 64.1200(f)(12) (definition of telemarketing). Similarly, common evidence is credibly predicted to show that every class member received a call using a soundboard voice. *See*, doc. no. 67, TR. at 84:14 – 91:2 (Robert Biggerstaff). A common question will be whether this qualifies as a prerecorded message under the Act.

Defendants make various arguments in an attempt to show that the predominance requirement has not been met. Below, the court addresses some of these arguments, all of which are rejected.

Defendants argue that class-wide evidence cannot identify calls that include live human voices; however, the fact that some calls may have included live voices, at some stage, does not defeat any of the elements of the claim.

Defendants argue that class-wide evidence cannot prove who was on the line during each call; however, the subscriber has statutory standing under the TCPA to bring a claim for calls made to that number regardless of whether he personally answered the call. As stated in Maraan v. DISH Network, L.L.C., 2014 WL 6603233 at *5 (S.D. Ohio 2014): "That Dr. Maraan did not answer the calls does not rob him of standing in this Court's view. He subscribed to a cellular telephone service on behalf of himself and other family members, a fairly typical and provider-encouraged scenario, and that status alone permits him to bring suit under the TCPA."[16] Arguments about who answered the phone do not defeat the predominance requirement.

Defendants argue that class-wide evidence cannot prove that the residential line requirement is met; however, common evidence shows that defendants intended

[16] Leyse v. Bank of Am. Nat'l Ass'n, 804 F.3d 316 (3d Cir. 2015), does not hold otherwise. That decision addressed whether other residents (*i.e.* non-subscribers) have standing. It held that even non-subscribers who reside within the household fall within the zone of interests of the act. *Id.* at 325-27.

to call, and did call, residential telephone numbers. Northstar is in the business of providing "security and home automation systems to home owners across most of the country." Doc. no. 69-1 at 23:9-11. It was for that reason that Northstar purchased a marketing list from Red Dot Data "for homeowners specifically," containing their landline telephone numbers. Doc. no. 42-4 at 18:2 -- 19:16; 25:2-6.[17] Arguments about Braver's phone number as it appeared in a Chamber of Commerce business listing are of negligible relevance here.

Defendants also argue that the issue of Northstar's vicarious liability for the calls requires individual inquiries into the belief of each class member with respect to whether Yodel was an agent of Northstar. The question of actual authority, however, depends upon the relationship and conduct between the defendants and requires no evidence from any consumer. Krakauer v. Dish Network L.L.C., 311 F.R.D. 384, 395 (M.D. N. Car. 2015). Thus, it is an issue which depends upon class-wide evidence. If plaintiff presents evidence sufficient for a jury to find actual authority, then any alleged individual issues regarding apparent authority or ratification will not predominate, as "it will not be necessary to reach apparent authority or ratification if [Plaintiff] and the class prevail on an actual authority theory." *Id.* at 396.

Furthermore, vicarious liability under theories of apparent authority and ratification are also subject to class-wide proof. Ratification depends on defendants' post-message behavior without concern for any conduct by the class members. Kristensen v. Credit Payment Servs., 12 F.Supp.3d 1292, 1306 (D. Nev. 2014); *see*

[17] Defendants argue that there is no list called the "Red Dot Data marketing list," the list referred to in the proposed class descriptions. However, as explained in the deposition testimony cited in the accompanying text (doc. no. 42-4 at p.18), a marketing list was compiled by Yodel from Flex Marketing Group, LLC, and Red Dot Data, LLC. *And see*, Kristensen v. Credit Payment Services, 12 F. Supp.3d 1292, 1303 (D. Nev. 2014) ("Data from T-Mobile calling lists can be used to identify the individual class members.").

also, Valle v. Global Exch. Vacation Club, 320 F.R.D. 50, 61 (C.D. Cal. 2017) (holding individual ratification issues do not predominate because "common question is whether Defendants ratified [] conduct by accepting customers [] sent to [it]"). Similarly, apparent authority depends on whether a reasonable person would believe that the caller had authority to act on behalf of Northstar. Kristensen, 12 F.Supp.3d at 1306. Because the inquiry is limited to how a reasonable person would perceive the calls at issue, there is no need to determine how individual class members perceived the calls. *See also*, Hawk Valley, Inc. v. Taylor, 301 F.R.D. 169, 188 (E.D. Pa. 2014) (certifying TCPA class and rejecting argument that individual issues regarding vicarious liability predominated).

As explained below, the court also rejects defendants' argument that individualized consent issues defeat the predominance requirement or otherwise defeat certification of a class.

Prior express written consent to the calls in question constitutes an affirmative defense. 47 U.S.C. §227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3); Van Patten v. Vertical Fitness Group, 847 F.3d 1037, 1044 (9th Cir. 2017); Gupta v. E*Trade Bank, 2013 WL 12155220 at *2 (D. N. Mex. 2013) (citing a 2011 Ninth Circuit opinion, unpublished, and Breslow v. Wells Fargo Bank, N.A., 857 F. Supp.2d 1316, 1319 (S.D. Fla. 2012). Thus, these arguments go to a defense, not to an element of plaintiff's claim alleged in count one.

Furthermore, consent may be a common question in cases, such as this one, in which evidence shows defendants had no prior relationship with class members and that defendants purchased their telephone numbers from a third party. *See*, Gene v. Gene LLC v. BioPay LLC, 541 F.3d 318, 328 (5th Cir. 2008) ("whether the inclusion of the recipients' fax numbers in the purchased database indicated their consent to receive fax advertisements" was a common question and "there were therefore no questions of individual consent."); Hinman v. M & M Rental Ctr., 545

F.Supp.2d 802, 807 (N.D. Ill. 2008) ("M and M's fax broadcasts were transmitted *en masse* based on the 'leads' list compiled several years earlier. Under the circumstances, the question of consent may rightly be understood as a common question. . . . The possibility that some of the individuals on the list may separately have consented to the transmissions at issue is an insufficient basis for denying certification.").

In any event, defendants, to date, have presented no evidence of any written consent, making such a defense speculative (to be charitable about it).[18] Such a speculative defense does not defeat predominance. *See*, Del Valle v. Global Exchange Vacation Club, 320 F.R.D. 50, 61 (C.D.Cal., 2017) ("Defendants' speculation that customers may have given their consent to receive telemarketing calls . . . is not sufficient to defeat class certification -- especially where Plaintiff has offered persuasive evidence that [defendants do] not obtain express consent before cellular phone numbers are called by Defendants' vendors on their behalf."); Booth v. Appstack, Inc., 2015 WL 1466247, at *10–12 (W.D.Wash. 2015) ("in the absence of any affirmative evidence of consent, consent is a common issue with a common answer," citation omitted).

The court concludes that while it is conceivable consent issues might require determination separate from class-wide issues at a later stage, common issues (including common issues related to consent)[19] plainly predominate.

The predominance requirement is satisfied.

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[18] There was deposition testimony that Yodel told NorthStar the people called had "given consent" but that NorthStar did not inquire as to whether the people called had given their express written consent, signed, and expressly stating that they were consenting to receive prerecorded calls. Doc. no. 42-3, p. 171.

[19] For example, to the extent that a standardized consent document is ever identified, whether it meets the disclosure standard of 47 C.F.R. § 64.1200(f)(8) will be a common question.

2. Superiority

The superiority requirement of Rule 23(b)(3) ensures that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The "class action device is frequently superior where proceeding individually would be difficult for class members with small claims." Belote v. Rivet Software, Inc., 2013 WL 2317243, *4 (D. Colo. 2013), paraphrasing Seijas v. Republic of Argentina, 606 F.3d 53, 58 (2d Cir. 2010). *See*, Mims v. Arrow Financial Services, LLC, 565 U.S. 368, 386 (2012) (recognizing that plaintiffs are unlikely to pay a $350 filing fee[20] to advance an individual TCPA claim for $500). A class action avoids this problem by aggregating what would otherwise be a series of "too small" potential individual recoveries. *See*, In re Checking Acct. Overdraft Litig., 286 F.R.D. 645, 659 (S.D. Fla. 2012) ("The class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability.")

The court also notes that, as a general proposition, class relief is potentially available for all claims, including minimum statutory damage claims, assuming there is no clear expression of congressional intent to exempt the claims from Rule 23. *See*, Califano v. Yamasaki, 442 U.S. 682, 700 (1979) ("[i]n the absence of a direct expression by Congress of its intent to depart from the usual course of trying 'all suits of a civil nature' under the [Federal] Rules [of Civil Procedure] established for that purpose, class relief is appropriate in civil actions brought in federal court...."). There is no express restriction of class relief with respect to claims under the TCPA. In addition, there is no incentive for suit created by any fee-shifting provision under the TCPA.

[20] The current filing fee in this court is $400.00.

Defendants argue that Braver's own past success in bringing individual claims indicates that class treatment is not superior. The court rejects this argument.

The circumstances of this action include: standardized conduct by the defendants, impacting numerous consumers who are geographically dispersed; a potential recovery by an individual consumer which is most likely too small to justify bringing an individual action; and evidence which indicates that defendants took steps to conceal their identity from the persons called, making it difficult for consumers to obtain the type of information that would permit them to pursue individual remedies. Given these circumstances, class action certification enables consumers to obtain a financial recovery (if legally and factually warranted) they might not have otherwise pursued on their own behalf, or which they might have been unable to pursue on their own behalf. At this juncture, the court does not perceive any insurmountable difficulties in managing a class action. For example, compliance with the notice requirements of Rule 23 should not pose a problem as defendants have records identifying the numbers called.

Class treatment will provide the fairest and most efficient adjudication of the alleged violations of the TCPA. The superiority requirement of Rule 23(b)(3) is satisfied.

E. The Class Definitions: Ascertainability

Although not enumerated in Rule 23, some courts require that a class definition be "precise, objective, and presently ascertainable." Lavigne v. First Community Bancshares, Inc., 2018 WL 2694457, *6 (D. N.Mex. June 5, 2018) (certifying TCPA class).

The Tenth Circuit has not spoken on this requirement and several circuits have rejected it. *See*, City Select Auto Sales, Inc. v. BMW Bank of North America, Inc., 867 F.3d 434, 443 (3d Cir. 2017) (concurring opinion notes that the Second, Sixth, Seventh and Ninth Circuits have rejected this requirement and argues that the Third

Circuit should do so as well; in City Select, the majority reversed the district court's denial of certification). Nevertheless, district courts within this circuit have applied a standard of ascertainability which requires: first, that the class be defined with reference to objective criteria; and second, a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. *See*, *e.g.*, In re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litigation, 2014 WL 104964, *2 (W.D. Okla. Jan. 9, 2014), citing Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 355 (3d Cir. 2013).

Here, the proposed class definitions are precise and objective. Phone numbers, names, and addresses of class members appear in the documents of Red Dot Data. The ascertainability requirement is generally satisfied where such business records can be used to identify the class. *See e.g.*, AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co., 321 F.R.D. 677, 684 (M.D. Fla. 2017) ("Defendants' records, data, and electronic systems . . . satisfy the objective criteria necessary to ascertain the class members. . . . The inquiry does not require a highly individualized assessment of the insureds because [certain information] . . . is readily accessible from Defendants' files.").

A list of telephone numbers that fall within the class definition satisfies the ascertainability requirement, and here there is additional contact information on top of that, available in the data. *See*, Sandusky Wellness Center, LLC v. Medtox Sci., Inc., 821 F.3d 992, 997 (8th Cir. 2016) (finding, in a TCPA case, that "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable"); American Copper & Brass v. Lake City Industrial Products, Inc., 757 F.3d 540 (6th Cir. 2014) ("the fax numbers are objective data satisfying the ascertainability requirement."); Birchmeier v. Caribbean Cruise Line, Inc., 302 F.R.D. 240, 248 (N.D. Ill. 2014) ("it is fairly clear that the identities of the persons whose numbers are on plaintiffs' list of 930,000 -- indeed, the subscribers

for those numbers at the time defendants called them -- are sufficiently ascertainable"); Kristensen v. Credit Payment Services, 12 F.Supp.3d 1292, 1303 (D. Nev. 2014) ("Data from T-Mobile calling lists can be used to identify the individual class members. Prospective plaintiffs can readily identify themselves as class members based on receipt of the text message."); Palm Beach Golf Center-Boca, Inc. v. Sarris, 311 F.R.D. 688, 692, 694 (S.D. Fla. 2015) (report indicated there was an error-free transmission of a one-page fax to 7,058 unique fax numbers on certain dates; court stated, "The proposed class definition here is similar to those approved by numerous courts in other B2B TCPA class actions. The majority of courts to consider the issue have concluded that such a definition, supported by a report like the Biggerstaff report prepared for this case, satisfies Rule 23's implicit ascertainability and administrative feasibility requirement.").

Defendants argue that a class is not sufficiently definite if it includes persons who have no claim because, for example, no prerecorded message was played in certain situations, making it necessary to listen to each of the calls to identify proper class members. Defendants argue it would not be administratively feasible to identify class members by this method, which means that the class is not sufficiently ascertainable. Defendants have offered no evidence to show that the proposed class includes individuals to whom no prerecorded message was played, and plaintiff's proposed class and evidence makes such situations extremely unlikely. For example, the length of the call which is used to define the proposed class (calls lasting 30 seconds) would eliminate situations in which a called person hung up before the prerecorded message was played. Furthermore, if it should prove necessary, these types of concerns could be addressed by a claims procedure after the major, common issues are determined on a class-wide basis.

Defendants argue that ascertainability has not been shown because there may be some class members who have no claim because they did not personally answer

the phone when their number was dialed. The court rejects this contention because, as previously explained, the subscriber to a particular phone number has standing without regard to whether he answered the call in question.

Defendants also argue that ascertainability concerns are raised because the class is an improperly defined "fail safe" class. Defendants cite Taylor v. Universal Auto Group I, Inc., 2014 WL 6654270, at *22 (W.D.Wash.,2014) (inclusion of the "without prior consent" language in the national classes definition makes it a fail safe class; rather than deny certification, court provided plaintiff with an opportunity to refine the class definition). The class definitions proposed by the plaintiff are not defined in terms of consent, and there is no fail safe problem.

Ascertainability requirements are satisfied.

IV. Class Certification

After careful consideration, the court finds and concludes that plaintiff has satisfied the requirements of Rule 23(a) and Rule 23(b)(3). This case is well-suited to adjudication under Rule 23. Plaintiff's motion for class certification is, accordingly, **GRANTED**. Doc. no. 42.

As proposed by the plaintiff, the following class and subclass are **CERTIFIED** with respect to count one of the first amended complaint.

> Class:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 20 or 50 to the call, and that resulted in the normal clearing disposition.

> Subclass:
>
> All persons in the Red Dot Data marketing list for whom Yodel's records reflect a telephone call regarding Northstar's home security systems that lasted more than 30 seconds, that was handled by an agent who applied status code 50 to the call, and that resulted in the normal clearing disposition.

Excluded from the class are:

Any persons whose contact information is associated with either an IP address or website URL in the Red Dot Data marketing list.

V. Schedule

The parties are **DIRECTED** to confer with a view to filing a jointly proposed schedule which addresses the timing of notice to the class, as well as the timing of any pre-trial motions or other pre-trial matters that will require the court to rule. The jointly proposed schedule **SHALL** also inform the court of plaintiff's position regarding the status of count three of the first amended complaint. The jointly proposed schedule is **DUE** within thirty days of the date of this order. After review of the jointly proposed schedule, the court will determine whether it is necessary to hold another scheduling conference at this stage. If the parties are unable to agree on a jointly proposed schedule, they shall so notify the court within thirty-one days of the date of this order.

IT IS SO ORDERED this 15th day of October, 2018.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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EXHIBIT 4

northstar_dial_counts

outbound_calls	date
5813	2016-02-15
94051	2016-02-16
137100	2016-02-17
130331	2016-02-18
177907	2016-02-19
358	2016-02-20
181025	2016-02-22
229069	2016-02-23
255441	2016-02-24
283214	2016-02-25
350655	2016-02-26
103	2016-02-27
206801	2016-02-29
195654	2016-03-01
221549	2016-03-02
234220	2016-03-03
274999	2016-03-04
110	2016-03-05
246020	2016-03-07
248894	2016-03-08
256475	2016-03-09
260676	2016-03-10
288532	2016-03-11
266	2016-03-12
252670	2016-03-14
252177	2016-03-15
265927	2016-03-16
268739	2016-03-17
289149	2016-03-18
226	2016-03-19
229564	2016-03-21
183261	2016-03-22
208981	2016-03-23
157779	2016-03-24
148870	2016-03-25
10	2016-03-26
215703	2016-03-28
213888	2016-03-29
195488	2016-03-30
201814	2016-03-31
219102	2016-04-01
173080	2016-04-04
152919	2016-04-05
171017	2016-04-06
156894	2016-04-07
166221	2016-04-08
226	2016-04-09
152004	2016-04-11
141390	2016-04-12
172416	2016-04-13

northstar_dial_counts

215833	2016-04-14
239463	2016-04-15
229021	2016-04-18
267591	2016-04-19
317508	2016-04-20
324655	2016-04-21
308895	2016-04-22
121	2016-04-23
266142	2016-04-25
291339	2016-04-26
331996	2016-04-27
322942	2016-04-28
359955	2016-04-29
8	2016-04-30
287695	2016-05-02
295586	2016-05-03
307293	2016-05-04
320119	2016-05-05
384954	2016-05-06
5214	2016-05-07
269007	2016-05-09
340707	2016-05-10
324640	2016-05-11
356381	2016-05-12
361264	2016-05-13
175	2016-05-14
305661	2016-05-16
317363	2016-05-17
394894	2016-05-18
367906	2016-05-19
399854	2016-05-20
76050	2016-05-21
398821	2016-05-23
453969	2016-05-24
479137	2016-05-25
459055	2016-05-26
470425	2016-05-27
70306	2016-05-28
307771	2016-05-30
444904	2016-05-31
414884	2016-06-01
402299	2016-06-02
449783	2016-06-03
100994	2016-06-04
486873	2016-06-06
542262	2016-06-07
519920	2016-06-08
441929	2016-06-09
501985	2016-06-10
95580	2016-06-11
372942	2016-06-13

northstar_dial_counts

330558	2016-06-14
320152	2016-06-15
315769	2016-06-16
326326	2016-06-17
78265	2016-06-18
307151	2016-06-20
324663	2016-06-21
284200	2016-06-22
321907	2016-06-23
327891	2016-06-24
323255	2016-06-27
309420	2016-06-28
362883	2016-06-29
374251	2016-06-30
392378	2016-07-01
413974	2016-07-05
394486	2016-07-06
379766	2016-07-07
404722	2016-07-08
111404	2016-07-09
381862	2016-07-11
480614	2016-07-12
584833	2016-07-13
561739	2016-07-14
643541	2016-07-15
616871	2016-07-18
621671	2016-07-19
712341	2016-07-20
723546	2016-07-21
823575	2016-07-22
835859	2016-07-25
867820	2016-07-26
819636	2016-07-27
925856	2016-07-28
971562	2016-07-29
1161175	2016-08-01
1144131	2016-08-02
645676	2016-08-03
433	2016-08-04
107	2016-08-05
1247876	2016-08-08
1290436	2016-08-09
1342076	2016-08-10
1141198	2016-08-11
1160727	2016-08-12
1190020	2016-08-15
1244440	2016-08-16
1070246	2016-08-17
1262585	2016-08-18
1109786	2016-08-19
1106624	2016-08-22

northstar_dial_counts

1162189	2016-08-23
1114439	2016-08-24
1058756	2016-08-25
1106572	2016-08-26
1154909	2016-08-29
1017732	2016-08-30
1073862	2016-08-31
1132926	2016-09-01
906687	2016-09-02
979599	2016-09-06
833751	2016-09-07
1031170	2016-09-08
4031	2016-09-10
215538	2016-09-13
375192	2016-09-14
438668	2016-09-15
454830	2016-09-16
416372	2016-09-19
308365	2016-09-20
272092	2016-09-21
255921	2016-09-22
244811	2016-09-23
218461	2016-09-26
212821	2016-09-27
241180	2016-09-28
260203	2016-09-29
243152	2016-09-30
237421	2016-10-03
255411	2016-10-04
262666	2016-10-05
240893	2016-10-06
213528	2016-10-07
189539	2016-10-10
191172	2016-10-11
168888	2016-10-12
180078	2016-10-13
173206	2016-10-14
186768	2016-10-17
202648	2016-10-18
194341	2016-10-19
180496	2016-10-20
164861	2016-10-21
171579	2016-10-24

EXHIBIT 5

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

-o0o-

1. ROBERT H. BRAVER, for himself and all individuals similarly situated, Plaintiff, v. 1. NORTHSTAR ALARM SERVICES, LLC, a Utah Limited Liability Company; 2. YODEL TECHNOLOGIES, LLC; 3. DOES 2-10, UNKNOWN INDIVIDUALS, Defendants.	Civil No. 5:17-cv-00383-F Judge Stephen P. Friot

DEPOSITION OF KYLE WOOD, VOLUME II

Taken on December 19, 2017

at 11:28 a.m.

At the Offices of Alpine Court Reporting
243 East 400 South, Suite B101
Salt Lake City, Utah 84111

Reported by: Michelle Mallonee, RPR, CSR

P R O C E E D I N G S

KYLE WOOD,

having been first duly sworn,

was examined and testified as follows:

EXAMINATION

BY MR. SOSTRIN:

Q. Okay, Mr. Wood. Looking again at Exhibit 5. If you could take a look at the Column L. We talked about cc_agent.

A. Yes.

Q. You said earlier -- or scratch that.

How is that populated? Is it an automated process?

A. Yes.

Q. And what is the trigger that populates that column?

A. I believe it's when a -- when a call is bridged from an agent -- or from calling out to an agent. So when it sees that connection to whatever agent's taking the call, that's what populates that.

Q. Okay. So if there's a -- let's say that a call was placed by the dialer and it's then transferred to the soundboard agent and then the person immediately hangs up the phone, the calling party immediately hangs up the phone.

MR. BEATY: Objection. Form.

THE WITNESS: That means that they're using their agents, but it's time based on how much they're logged into the system.

Q. (BY MR. SOSTRIN:) So the hourly rate isn't necessarily time that -- is it time that someone's on the phone, or is it time that the system is running?

A. It's the time that the agent is on the phone.

Q. Okay. So if -- let's say there was a day where there were 10,000 dials but none of them ever transferred to a soundboard agent.

There would be no billing for that day?

A. No, it's the login time for the agents.

Q. Okay. So the agents are logged in and expecting to have calls transferred to them --

A. Yes.

Q. -- by the predictive dialer, correct?

A. Correct.

Q. So it's that -- the time that those soundboard agents are logged into their system?

A. Yes.

Q. Okay. Did NorthStar ever use the option to use its own agents?

A. No.

Q. Do you know how much the -- the employees of the

call center in India are paid for their time?
A. I do not.
Q. How much did you pay the contractor for the services?
THE WITNESS: Is that relevant, Eric?
MR. SOSTRIN: Yeah, it is.
MR. ALLEN: I'll object to relevance, but.
THE WITNESS: On that particular campaign, I'd have to check. But it would be anywhere from 2 to 2.50 an hour.
Q. (BY MR. SOSTRIN:) And so that's the same calculation in terms of the time that they're logged into the system?
A. Yes.
Q. Okay. Now, how does it work that -- so these are folks that are in India, and ultimately the dialer is going to transfer calls to them.
Are they logged into Yodel's system remotely through the Internet? How does it work?
A. Yes, they're logged in remotely through the Internet.
Q. And what software do they use to track the calls? Is it Yodel software?
A. Yes.
Q. So you provided it to the call center for them

with NorthStar?
A. It just wasn't put in there.
Q. Did NorthStar ever --
A. Again --
Q. Sorry.
A. Sorry. This is an example of the very first script we ever sent them.
Q. Okay.
A. This isn't a final version of NorthStar's script.
Q. Okay.
A. So that's something to understand here.
Q. Okay. Thanks for that clarification.
Did NorthStar ever request that their name be put into the script?
A. I'm not sure. Again, I'd have to look at the final script NorthStar has.
Q. Did -- does Yodel -- has Yodel ever made soundboard calls on behalf of someone that wanted their name in the actual soundboard script?
A. Yes.
Q. Okay. So some customers have requested that?
A. Yes.
Q. The script says, "The reason why I am calling today is that there have been issues with false alarms

with home security systems in your neighborhood."

Do you see that?

A. Umm-hmm.

Q. What's that about?

A. Just sales language.

Q. So is there any source from which issues with false alarms came from?

A. Not that I'm aware of, no.

Q. Okay. And then was -- these calls were not directed to particular -- to persons in particular neighborhoods that had security issues with false alarms, right?

A. No, I don't think so.

Q. Okay.

MR. SOSTRIN: So do you guys want to break for lunch?

MR. ALLEN: I do. I'm on Central time.

MR. SOSTRIN: Let's break for lunch.

(A break was taken from 12:09 p.m. to 12:29 p.m.)

(Exhibit-9 was marked for identification.)

Q. (BY MR. SOSTRIN:) Okay. Mr. Wood, I'm going to place Exhibit 9 into my computer, and there are some files on here that we're going to listen to or look at. So I'm going to play the file that's marked NorthStar Bates No. 108.mp3.

CERTIFICATE

State of Utah)
ss.
County of Salt Lake)

I hereby certify that the witness in the foregoing proceeding was duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken at the time and place herein named;

That the deposition is a true record of the witness' testimony;

That the testimony of said witness was reported by me in stenotype and thereafter transcribed into typewritten form;

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action, and that I am not interested in the event thereof.

Michelle Mallonee

Michelle Mallonee, RPR, CSR
Utah CSR #267114-7801
Expires May 31, 2018

EXHIBIT 6

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition for Expedited Declaratory Ruling Clarifying 47 U.S.C. § 227(b)(1)(B) of the Telephone Consumer Protection Act	CG Docket No. 02-278

APPENDIX A
to Comments of Robert BRAVER in Opposition to Petition for Expedited Declaratory Ruling filed by Northstar Alarm Services, LLC

Transcript of Northstar's August 26, 2016 Soundboard Call to Mr. BRAVER

BRAVER: Hello?

PRERECORDED VOICE: Hello, this is Billy. I'm a party advisor here with the local department of home security on a recorded line. Can you hear me okay?

BRAVER: Yeah, I'm sorry, who is this?

PRERECORDED VOICE: Okay, good. I'm with the security help center and the reason why I'm calling today is that there have been issues with false alarms with home security systems in your neighborhood. Have you been informed about that?

BRAVER: Uh, no I've had no issues with false alarms.

PRERECORDED VOICE: So it's my job to make sure that all the homes in your neighborhood are aware of the technologies and security programs available in your area. I just have a couple questions to see what your home will qualify for. Now, do you own your home?

BRAVER: Yeah, so what is it that is specific about my area verses other areas?

PRERECORDED VOICE: I understand, what I can do for you, so you don't miss out on this limited time offer is transfer you over to a specialist to explain the details to you. Then you can decide for yourself if it's a good fit for you and your family.

BRAVER: Okay, well I, I don't understand your…I guess I don't know that you understood my question. So, you're talking about stuff that's specific to my area? What is that is different in my area verses other areas?

Pause

BRAVER: Hello? Are you there?

PRERECORDED VOICE: Okay.

BRAVER: Hello?

PRERECORDED VOICE: Haha, you know I actually get that a lot. This is a legitimate offer we're actually looking for a model home in your area and word of mouth is how we grow our company. But before you decide anything, I just want to finish up here and get you over to a security specialist and they will, you know, give you all the details and you can decide for yourself if it's a good fit.

BRAVER; Okay, well I really don't have time to get into, uh, any kind of lengthy discussion with anyone at the moment cause I'm kind of in the middle of something. Umm, but I'm… you're not really clear cause you're not really answering my question.

PRERECORDED VOICE: You know, I don't really know that off the top of my head. If you remember that; I think I can get someone to help answer that in a moment.

BRAVER: okay well, like I said I really don't have time to get involved with anything at the moment.

PRERECORDED VOICE: Uhh, yeah, no. We're not going to be much longer.

BRAVER: Okay, and what company did you say you were with?

PRERECORDED VOICE: Are you a US citizen?

BRAVER: Uh yes, but what company did you say you were with?

PRERECORDED VOICE: Does your home have at least two bedrooms?

BRAVER: Uh yes.

PRERECORDED VOICE: Okay, is your home a mobile home or trailer?

BRAVER: Uh no.

PRERECORDED VOICE: Okay. Now it looks like this is all the information I need to see if I can qualify you.

BRAVER: Okay and what company did you say you were with again?

PRERECORDED VOICE: I am with the security help center.

BRAVER: Security Help Center? Never heard of em'.

PRERECORDED VOICE: Okay, now it looks like this is all the information I need to see if I can qualify you. Let's see here. Okay, one second. Uh yes, okay, it does look like you do qualify to speak with one of our security specialists about how to make your home more secure. Okay,

so, now based on the information you've given me. You do seem like a person who does seem concerned about your security within your home. Okay.

BRAVER: Uh, no.

PRERECORDED VOICE: I feel like you can benefit from some new information on how to make your home more secure.

BRAVER: Well, I guess I'm still not understanding what's the issue? Issue with false alarms in the neighborhood. What is it about my neighborhood? Is what I am still not understanding. What is it about my neighborhood that's causing false alarms? I don't have any problems with that. That's why I am all confused here.

PRERECORDED VOICE: that's fine. Oh, and I almost forgot one last question. Now do you currently have a home security system ?

BRAVER: Um yes.

PRERECORDED VOICE: Okay, can you please confirm your first and last name.

BRAVER: Uh, this is Robert BRAVER.

PRERECORDED VOICE: I am going to schedule a time for a security specialist to give you a call back to discuss the details. Now what's the best time for them to reach you, morning, afternoon or evening?

BRAVER: It just depends on what day it is or what my schedule is. Do they make calls on weekends?

PRERECORDED VOICE: Now, before we finish up, I want to check one last thing here. But I want to see if we have a specialist available now for you to speak with.

BRAVER: I don't have time for that right now.

PRERECORDED VOICE: Uh okay yeah. This is good, we do actually have someone that covers your area that we can connect you with right now. Hang on while I bring one of them on.

BRAVER: I don't have time for that right now.

PRERECORDED VOICE: Yes people are doing things that they normally wouldn't do. So, the crime rate is continuing to go up, but I can simply get you over to a specialist. If you don't like what you hear, then we can just shake hands and part as friends, okay?

BRAVER: Yeah, I don't have time for that right now, but you said someone would, could call me later? That would be fine.

Pause

PRERECORDED VOICE: Uh Hello, are you still there?

BRAVER: Yeah, I'm here. Like I said I don't have time. You said that someone could call me back at a later time. That would be alright, but I don't have time right now.

PRERECORDED VOICE: Uh yeah no. we're not going to be much longer.

BRAVER: Yeah I don't have time to talk. I have to go like right now. I got someone waiting on me. I don't have time to talk to anyone right now.

PRERECORDED VOICE: Look, I understand. A lot of people I talk to actually think…

PRERECORDED VOICE: Uh yeah no, were not going to be much longer.

BRAVER: Okay, I have to get off the phone now. Hello? Hello? Is anybody there? Hello?

PRERECORDED VOICE: So you…

**** Call is Transferred to a Live Sales Agent * * * *

EXHIBIT 7

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Lois C. Greisman
Associate Director
Division of Marketing Practices

November 10, 2016

Michael Bills
132 S 600 East, Suite 204
Salt Lake City, UT 84102

Re: September 11, 2009 Staff Opinion Letter on Soundboard Technology

Dear Mr. Bills:

We are writing to you regarding the informal staff opinion letter we provided to your former company, Call Assistant, LLC, on September 11, 2009. [1] Our September 2009 letter responded to Call Assistant's inquiry regarding whether the Telemarketing Sales Rule's ("TSR") provisions governing outbound telemarketing calls that deliver prerecorded messages[2] apply to calls utilizing soundboard technology, which is technology that allows a live agent to communicate with a call recipient by playing recorded audio snippets instead of using his or her own live voice. In the September 2009 letter, staff stated its opinion that the technology, as described by Call Assistant, would not be subject to the prerecorded message provisions of the TSR. Staff's opinion was based on important features that Call Assistant highlighted about its technology – i.e., that for the entire duration of a call made using the technology, a single live agent stays with the call from beginning to end, listens to every word spoken by the call recipient, determines what is heard by the call recipient, and has the ability to interrupt recordings and use his or her own voice to communicate with the call recipient if needed. In our view at that time, these features made the calls "virtually indistinguishable" from normal two-way conversations with live operators and placed them outside the scope of the TSR's prerecorded message provisions.

Since the issuance of our September 2009 letter, staff has received a steadily increasing volume of formal and informal complaints from consumers about telemarketing calls utilizing soundboard technology. Consumers complain that during these calls they are not receiving appropriate recorded responses to their questions or comments. Consumers further complain that often no live telemarketer intervenes to provide a human response when requested to do so, the recorded audio snippets that are played do not adequately address consumer questions, or the call

[1] A copy of the September 11, 2009 staff opinion letter can be found at http://www.ftc.gov/sites/default/files/documents/advisory_opinions/opinion-09-1/opinion0901_1.pdf. Call Assistant, LLC, filed for Chapter 7 bankruptcy on August 13, 2015. *In re Call Assistant LLC*, Case No. 15-11708 (KJC) (Bankr. D. Del. Aug. 13, 2015).

[2] 16 C.F.R. § 310.4(b)(1)(v).

is terminated in response to consumers questions. Indeed, media reports also have taken note of this phenomenon, which some in the press have dubbed telemarketing "robot" calls.[3] Simply put, since we issued the letter in 2009, staff has seen evidence of the widespread use of soundboard technology in a manner that does not represent a normal, continuous, two-way conversation between the call recipient and a live person. This is inconsistent with the principles we laid out in our September 2009 letter as well as our understanding of the technology at the time we issued the letter.[4] Moreover, this type of use does not provide the consumer benefits upon which we based our September 2009 opinion.

In response to rising complaints and concerns, staff reached out to the Professional Association for Customer Engagement ("PACE"), which is a trade association representing call centers, and the Soundboard Association, a trade organization representing manufacturers and users of soundboard technology. During the last few months, we have had multiple productive discussions and meetings with PACE and the Soundboard Association to learn more about soundboard technology and obtain industry input regarding the regulatory status of that technology. Both PACE and the Soundboard Association were responsive to requests, provided meaningful input to assist staff in its review of this technology, and highlighted the potential benefits of responsible soundboard use. Staff carefully considered the input of PACE and the Soundboard Association.

A fundamental premise of our September 2009 letter was that soundboard technology was a surrogate for the live agent's actual voice. A human being cannot conduct separate conversations with multiple consumers at the same time using his or her own voice. Nonetheless, some companies are routinely using soundboard technology in precisely this manner, and these companies are improperly using our September 2009 letter to justify their actions in court proceedings[5] and in investigations. Indeed, Call Assistant noted publicly that

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[3] *See, e.g.*., Sean Gallagher, *The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail*, ARS TECHNICA, (Apr. 15, 2015), http://arstechnica.com/information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail; Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC, (Dec. 20, 2013), http://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537/; Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC, (Dec. 13, 2013), http://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282/; Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's a Robot*, TIME, (Dec. 10, 2013), http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot/; Kris Hundley, *These Telemarketers Never Stray From Script*, TAMPA BAY TIMES, (Nov. 14, 2013), http://www.tampabay.com/news/these-telemarketers-never-stray-from-the-script/2152303.

[4] For example, Call Assistant highlighted the ability of its agents to use their own voices during calls using its soundboard technology: "Our technology merely substitutes sound files for the agent's voice (*although the agent can interject with his or her voice at any time*) . . . ." (emphasis supplied). *See also* September 2009 Letter at 1 ("In response to the greeting, the agent may elect to speak to the call recipient *using his or her voice*, or may press a button to play an appropriate recorded script segment. . . . At all times, even during the playing of a recorded segment, *the agent retains the power to interrupt any recorded message to listen to the consumer and respond appropriately*.") (emphasis supplied).

[5] *See, e.g., Fitzhenry v. ADT Corp.*, No. 9:14-CV-80180 (S.D. Fla.); *Barrett v. ADT Corp.*, No. 12:15-CV-1348 (S.D. Ohio).

one of the advantages of its technology is that "an agent can conduct multiple calls simultaneously."[6] Staff also has seen evidence that call centers are using soundboard technology to increase the number of outbound calls they can make. In addition, in our discussions and meetings, industry representatives acknowledged that call centers routinely use soundboard technology to allow a single live agent to handle more than one call at the same time.

The plain language of the TSR provision governing prerecorded calls imposes restrictions on "any outbound telephone call that delivers a prerecorded message."[7] It is indisputable that calls made using soundboard technology deliver prerecorded messages. As such, under the plain meaning of the words in the TSR's prerecorded call provision, outbound telemarketing calls using soundboard technology are covered because such calls "deliver a prerecorded message."[8]

Given the actual language used in the TSR, the increasing volume of consumer complaints, and all the abuses we have seen since we issued the September 2009 letter, we have decided to revoke the September 2009 letter. It is now staff's opinion that outbound telemarketing calls that utilize soundboard technology are subject to the TSR's prerecorded call provisions because such calls do, in fact, "deliver a prerecorded message" as set forth in the plain language of the rule.[9] Accordingly, outbound telemarketing calls made using soundboard technology are subject to the provisions of 16 C.F.R. § 310.4(b)(1)(v), and can only be made legally if they comply with the requirements set forth in Section 310.4(b)(1)(v)(A) (for calls selling goods or services), Section 310.4(b)(1)(v)(B) (for calls seeking charitable contributions from members or prior donors), or Section 310.4(b)(1)(v)(D) (healthcare messages by a covered entity or its business associate under HIPAA).

In reaching this conclusion, staff did consider whether an express requirement that live agents using soundboard technology only handle one call at a time would change the analysis. Staff has concluded that it would not. First, even with a 1-to-1 limitation in place, such calls would still "deliver a prerecorded message" and therefore would fall within the plain language of 16 C.F.R. 310.4(b)(1)(v). Moreover, in staff's view, a 1-to-1 limitation would not stop abusive use of the technology. Based on preliminary information provided by industry representatives, a significant percentage of the total number of call center seats utilizing soundboard technology are used to make telemarketing or lead generation calls. A 1-to-1 limitation would allow a lead generation operation to use soundboard technology in which live operators simply press a button to play a prerecorded message offering a good or service that asks the consumer to say "yes" or press 1 on their phone if they are interested. If the consumer says yes or presses 1, the live agent would then transfer the call to the seller who makes a telemarketing pitch. Such calls are indistinguishable from standard lead generation robocalls that are governed by the TSR and are the subject of a large volume of consumer complaints and significant telemarketing abuse. The

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[6] *Nougar, L.C., et al. v. Revocalize, LLC, et al.*, No. 2:11-cv-127, DE 41 (D. Utah, Oct. 18, 2011).

[7] 16 C.F.R. § 310.4(b)(1)(v).

[8] *Id.*

[9] *Id.* Staff notes that representatives of both PACE and the Soundboard Association disagree with this conclusion.

fact that a live operator, instead of a computer, "delivers" the prerecorded message and transfers interested consumers to sellers makes little difference from the call recipient's perspective. Thus, even a 1-to-1 limitation would permit soundboard technology to be used to deliver calls that are indistinguishable from the telemarketing robocalls that consumers consider to be abusive and that are illegal under the TSR.

Finally, staff does recognize that when the Commission adopted the TSR's robocall provisions TSR in 2008, it foresaw that technology could evolve to allow the use of interactive prerecorded messages in telemarketing calls in a manner "essentially indistinguishable from conversing with a human being."[10] Indeed, soundboard technology, when used properly, may one day approach that level of proficiency. If and when such advances occur, the Commission noted that parties could seek further amendment of the TSR or exemptions from the prerecorded message provisions.[11]

In order to give industry sufficient time to make any necessary changes to bring themselves into compliance, the revocation of the September 2009 letter will be effective six months from today, on May 12, 2017. As of that date, the September 11, 2009 letter will no longer represent the opinions of FTC staff and cannot be used, relied upon, or cited for any purpose.

In closing, staff notes that revocation of the September 2009 opinion letter does not mean that the TSR prohibits all calls made using soundboard technology. To the contrary, call centers can still use soundboard technology for in-bound calls and to place a wide variety of outbound calls, such as non-telemarketing calls (e.g., political calls, survey calls, and pure informational calls), telemarketing calls that fall within the exemptions set forth in Section 310.4(B)(1)(v)(A), (B), or (D), certain types of charitable donation calls, and calls that are expressly exempt from the TSR under Section 310.6 (e.g., business-to-business calls). In fact, the preliminary data provided indicates that a significant percentage of call center seats that utilize soundboard technology are used for in-bound calls or to place non-telemarketing calls, such as political or charitable calls. As long as those calls remain outside the scope of the TSR, companies can continue to use soundboard technology for those types of calls without violating the TSR. Please note, however, that we do not opine on whether the use of such technology complies with state or other federal laws, including the Telephone Consumer Protection Act, 47 U.S.C. § 227, or its corresponding regulations implemented by the Federal Communications Commission, 47 C.F.R. § 64.1200.

Please be advised that the views expressed in this letter are those of the FTC staff, subject to the limitations in 16 C.F.R. § 1.3. They have not been approved or adopted by the Commission, and they are not binding upon the Commission. However, they do reflect the views of staff members charged with enforcement of the TSR.

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[10] *Telemarketing Sales Rule*, 73 Fed. Reg. 51,164, 51,1180 (Aug. 29, 2008).

[11] *Id.* ("Accordingly, nothing in this notice should be interpreted to foreclose the possibility of petitions seeking further amendment of the TSR or exemptions from the provisions adopted here.")

Sincerely,

Lois C. Greisman
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